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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915
1914.

No. [REDACTED] 258

ARMOUR AND COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH DAKOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH
DAKOTA.

FILED OCTOBER 5, 1914.

(24,388)



(24,388)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 644.

ARMOUR AND COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH DAKOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH
DAKOTA.

INDEX.

	Original. Print	
Clerk's certificate	<i>a</i>	1
Writ of error.....	<i>b</i>	1
Citation and service.....	<i>d</i>	3
Transcript of record from the district court for the third judicial district in and for county of Cass.....	1	4
Sheriff's return of service..... (omitted in printing) ..	1	
Petition for leave to file information.....	2	4
Order granting leave to file information.....	2	4
Criminal information	2	4
Summons..... (omitted in printing) ..	4	
Demurrer to information.....	5	5
Order overruling demurrer, etc.....	6	5
Opinion, Pollock, J..... (omitted in printing) ..	7	
Notice of motion for a new trial.....	24	6
Motion for a new trial.....	25	6
Order denying motion for a new trial.....	25	6
Motion in arrest of judgment.....	26	6

	Original. Print	
Order denying motion in arrest of judgment.....	27	8
Judgment	28	8
Defendant's proposed statement of case (omitted in printing)	29	
Stipulation as to statement of the case (omitted in printing)	30	
Assignment of errors.....	31 <i>a</i>	8
Statement of the case.....	32	10
Amended information	32	10
Colloquy between court and counsel.....	33	10
Testimony of E. F. Ladd.....	34	11
Motion to dismiss overruled, etc.....	36	13
Testimony of E. F. Ladd (recalled).....	38	14
R. C. Howe.....	40	17
J. W. Nichols.....	73	45
R. C. Howe (recalled).....	99	69
G. C. Fox.....	126	93
R. L. Ruddick.....	138	104
Criminal information	149	113
Order settling statement of case.....	151	114
Minute entry overruling demurrer, &c.....	152	115
Minute entries of trial, &c.....	153	115
Plaintiff's Exhibit B—Bill of Armour & Co. against Aneta Merc. Co., April 2, 1910.....	157	118
Defendant's Exhibit 2—Schedule of prices.....	158	119
Defendant's Exhibit 1—Bill of Armour & Co. against E. F. Ladd.....	162	123
Notice of appeal.....(omitted in printing)..	163	
Judge's certificate to judgment roll (omitted in printing)	164	
Clerk's certificate.....(omitted in printing)..	165	
Order of argument and submission.....	166	123
Judgment	167	123
Opinion, Burke, J.....	168	124
Opinion, Bruce, J., specially concurring.....	211	143
Opinion, Fisk, J., dissenting.....	219	147
Petition for rehearing, etc.....	250	159
Order denying rehearing.....	291	190
Opinion on petition for rehearing.....	292	191
Substituted opinion, Burke, J.....	293	192
Substituted opinion, Bruce, J., specially concurring.....	316	210
Petition for a writ of error.....	321	214
Assignment of error.....	323	215
Order allowing writ of error.....	325	216
Bond on writ of error.....	326	217
Stipulation as to printing record.....	328	217

a STATE OF NORTH DAKOTA,
In the Supreme Court, ss:

I, R. D. Hoskins, Clerk of the Supreme Court of the State of North Dakota, by virtue of the foregoing Writ of Error, and in obedience thereto do hereby certify, that the following pages, numbered from one (1) to Three Hundred Twenty-seven (327), inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of Armour & Company, plaintiff in error, against the State of North Dakota, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed, at the City of Bismarck, State of North Dakota this 23d day of September, in the year of our Lord one thousand nine hundred and fourteen.

[Seal Supreme Court, State of North Dakota.]

R. D. HOSKINS,
Clerk of the Supreme Court, State of North Dakota.

b UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of North Dakota,
Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, at the October Term, 1913, thereof, between State of North Dakota, Plaintiff, and Armour & Company, a corporation, Defendant, a manifest error hath happened, to the great damage of the said Armour & Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this Writ, so that you have the said record and proceedings aforesaid at the City of Washington, District of Columbia, and filed in the office of the Clerk of the United States Supreme Court, on or before the 10th day of August, A. D. 1914, to the end that the record and proceeding aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 11th day of June, in the year of our Lord one thousand nine hundred and fourteen.

c Issued at office in Fargo, with the seal of the District Court of the United States for the District of North Dakota, and dated as aforesaid.

[Seal United States District Court, North Dakota.]

J. A. MONTGOMERY,
Clerk United States District Court,
By E. R. STEEL, Deputy.

Allowed by
HON. B. F. SPALDING,
Chief Justice of the Supreme Court
of the State of North Dakota.

For good cause shown, I, B. F. Spalding, Chief Justice of the Supreme Court of the State of North Dakota, do hereby extend the time wherein the return to the above writ of error can be made, up to and including the 1st day of September, A. D. 1914.

B. F. SPALDING,
Chief Justice of the Supreme Court of the
State of North Dakota.

It is hereby stipulated that the time for making the return to the above writ of error may be extended up to and including the 1st day of October, 1914.

J. S. WATSON,
N. C. YOUNG,
Attorneys for Plaintiff in Error.
ANDREW MILLER,
JOHN CARMODY,
ALFRED ZUGER,
Attorneys for State of North Dakota, Defendant in Error.

For good cause shown and pursuant to the above stipulation, I, B. F. Spalding, chief justice of the supreme court of the State of North Dakota, do hereby extend the time wherein the return to the above writ of error can be made up to and including the 1st day of October, A. D., 1914.

B. F. SPALDING,
Chief Justice of the Supreme Court of the
State of North Dakota.

c1/2 [Endorsed:] Writ of error. Original. "Lodged" and filed this 15th day of June, 1914. R. D. Hoskins, clerk. 2503. Filed in the Office of the Clerk of the Supreme Court June 15, 1914. State of North Dakota. R. D. Hoskins, Clerk. Copy of within writ of error received this 15th day of June, 1914. Andrew Miller, Att'y Gen., by John Carmody, ass't.

d In Supreme Court, State of North Dakota.

STATE OF NORTH DAKOTA, Plaintiff (Defendant in Error),
vs.
ARMOUR AND COMPANY, a Corporation, Defendant (Plaintiff in Error).

Citation.

UNITED STATES OF AMERICA, ss:

President of the United States to the State of North Dakota, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of North Dakota wherein Armour and Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of North Dakota, this 15th day of June, A. D. 1914.

BURLEIGH F. SPALDING,
*Chief Justice of the Supreme Court of the
State of North Dakota.*

R. D. HOSKINS,

[Seal Supreme Court, State of North Dakota.]

*Clerk of the Supreme Court of the
State of North Dakota.*

e STATE OF NORTH DAKOTA,
City of Bismarck, County of Burleigh:

June, 1914.

I, the undersigned, ^{*}attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation and enter an appearance for said defendant in error in the Supreme Court of the United States.

ANDREW MILLER,
Attorney General for the State of North Dakota,
By JOHN CARMODY,

Ass't Att'y.

f [Endorsed:] Original. Citation. 2503. Filed in the Office of the Clerk of the Supreme Court, Jun- 15, 1914. State of North Dakota. R. D. Hoskins, Clerk.

* * * * *

1 STATE OF NORTH DAKOTA,
County of Cass:

In District Court, Third Judicial District.

THE STATE OF NORTH DAKOTA

vs.

ARMOUR & COMPANY, a Corporation, Defendant.

[Endorsed:] Filed in the office of Clerk of District Court, Cass County, N. D. Sept. 15, 1911. E. C. Geary, Jr., Clerk.

2 To the Honorable Charles A. Pollock, Judge of the above named District Court:

Comes now the undersigned, Arthur W. Fowler, who is the duly elected, qualified and acting State's Attorney in and for the County of Cass and State of North Dakota, and under and pursuant to the provisions of Sec. 10227 of the Revised Codes of 1905 asks this Court for an order permitting him to file an information against the above named corporation, Armour & Company, charging it with a public offence, to-wit, a violation of the provisions of Chap. 236, Laws of 1911, without any previous action on the part of any committing Magistrate.

Dated at Fargo, N. D. this 15th day of September, 1911.

ARTHUR W. FOWLER.

Upon reading the above and foregoing petition, it is, hereby Ordered, pursuant to the provisions of said Sec. 10227, that said Arthur W. Fowler, State's Attorney in and for Cass County, is hereby permitted to file an information in the above named District Court against the above named corporation, Armour & Company, charging it with the commission of a public offence without any previous action on the part of any committing Magistrate.

Dated at Fargo, N. D. this 15th day of September, 1911.

CHAS. A. POLLOCK, Judge.

STATE OF NORTH DAKOTA,
County of Cass:

In District Court, Third Judicial District.

THE STATE OF NORTH DAKOTA

vs.

ARMOUR & COMPANY, a Corporation, Defendant.

Criminal Information.

[Endorsed on back of page 2:] Filed in the Office of Clerk of District Court, Cass Co., N. D. Sep. 15, 1911. E. C. Geary, Jr., Clerk.

To the District Court in and for said County:

3 & 4 Arthur W. Fowler, State's Attorney, in and for the County of Cass and State of North Dakota, in the name and by the authority of the State of North Dakota, infor

this Court, that heretofore, to-wit: on the 8th day of September, in the year of our Lord One Thousand Nine Hundred and Eleven, at Fargo, in the County of Cass, in the State of North Dakota, Armour & Company, (which said Armour & Company was then and there a corporation organized and existing under the laws of the State of New Jersey) did wilfully and unlawfully offer for sale and sell to one E. F. Ladd a quantity of lard, not in bulk, which said lard was then and there put up, sold and delivered to said E. F. Ladd in a pail which then and there held more than two pounds and less than three pounds net weight of lard: to-wit: two pounds and six ounces of lard and which said pail or container did not then and there have or display on the face label thereof true net weight of said lard, in even pounds or whole multiples thereof but expressed the weight of lard in pounds and ounces.

This against the peace and dignity of the State of North Dakota and contrary to the form of statute in such cases made and provided.

Dated this 15th day of September, 1911.

ARTHUR W. FOWLER,

State's Attorney in and for Cass County, North Dakota.

* * * * *

5

Title.

Demurrer.

Comes now the defendant, Armour & Company, by Messrs. Ball, Watson, Young & Lawrence, its attorneys, and demurs to the information filed herein upon the following grounds, to-wit:

1. That it appears upon the face of said information that the same does not state facts sufficient to constitute a public offense.

2. That the court has no jurisdiction of the subject-matter alleged in the complaint.

Dated October 2, A. D. 1911.

BALL, WATSON, YOUNG & LAWRENCE,

Attorneys for Defendant.

[Endorsed:] Filed in the Office of Clerk of District Court, Cass Co., N. D. Oct. 5, 1911. E. C. Gearey, Jr., Clerk.

6-23

Title.

Order.

The above entitled matter came duly on to be heard upon the demurrer of the defendant to the information filed herein, and now the court being fully advised in the matter, it is

Ordered, That said demurrer be and the same is hereby overruled.

Dated October 5th, 1911.

CHAS. A. POLLOCK,

Judge of the District Court.

To the foregoing ruling of the court overruling such demurrer, the defendant duly excepted and such objection is hereby allowed, and made a matter of record.

CHAS. A. POLLOCK,
Judge of the District Court.

[Endorsed:] Filed in the Office of Clerk of District Court, Cass Co., N. D. Oct. 5, 1911. E. C. Gearey, Jr., Clerk.

* * * * *

24

Title.

Notice.

To the Plaintiff above named and to Arthur W. Fowler, State's Attorney, and Edward Engerud, Attorneys for the Plaintiff:

You are hereby notified that upon the 8th day of April, 1912, the defendant above named will apply for a new trial of the above entitled action, which said new trial will be based upon the grounds mentioned in the attached and annexed motion which is hereby referred to and made a part hereof. Said motion will be made upon all the records and files in said action, and upon a statement of the case to be proposed and settled.

Dated January 30, A. D. 1912.

BALL, WATSON, YOUNG & LAWRENCE,
Attorneys for Defendant.

[Endorsed:] Filed in the Office of Clerk of District Court, Cass County, N. D. Apr. 8, 1912. E. C. Gearey, Jr., Clerk. A. T. Comstock, Deputy.

25

Title.

Motion for New Trial.

Now comes Armour and Company, defendant in the above entitled action, and moves the court for a new trial of the above entitled cause upon the following grounds and for the following reasons:

1. That the court erred in not directing a verdict in favor of the defendant.

2. That the verdict is contrary to law.

3. That the verdict is against the evidence.

4. That there is no evidence to support the verdict.

5. That it appears affirmatively by the evidence that no public offense has been committed by the defendant.

Dated January 30, A. D. 1912.

BALL, WATSON, YOUNG & LAWRENCE,
Attorneys for Defendant.

Upon considering the foregoing motion It is in all things denied. Defendant excepts to such ruling.

CHAS. A. POLLOCK, *Judge*.

April 8, 1912.

(Endorsed on back:) Filed in the Office of Clerk of District Court, Cass County, N. D. Apr. 8-1912. E. C. Gearey, Jr., Clerk, by A. T. Comstock, Deputy.

26

Title.

Motion in Arrest of Judgment.

Comes now Armour and Company, a corporation, defendant in the above entitled action, and moves the court that no judgment be rendered or entered on the verdict or finding of the court against the defendant upon the plea of the defendant in the above action, and that the said judgment be arrested for the following reasons:

1. That the court has no jurisdiction of the offense charged in the information.

2. That the evidence is insufficient to show the defendant guilty of any public offense.

3. That the information does not state facts sufficient to constitute a public offense.

4. That the court has no jurisdiction of the person of the defendant.

5. That it appears from the face of the information that the public offense charged to have been committed by the defendant is based upon a statute obnoxious to and controverting the provisions of the Fourteenth Amendment to the Constitution of the United States in that it denies to the defendant the equal protection of the laws.

6. That it appears from the face of the information that the public offense charged to have been committed by the defendant is based upon a statute obnoxious to and controverting the provisions of the Fourteenth Amendment to the Constitution of the United States in that it interferes with and restricts the right of commerce between states, and attempts to punish the defendant for an act or acts committed outside of the State of North Dakota.

7. That it appears from the face of the information that the public offense charged to have been committed by the defendant is based upon a statute obnoxious to and controverting the provisions of the Fourteenth Amendment to the Constitution of the United States in that it deprives the defendant of its liberty and property without due process of law.

8. That it appears from the face of the information that the public offense charged to have been committed by the defendant is based upon a statute obnoxious to and controverting the provisions of the Constitution of the State of North Dakota, namely: Section 22 thereof.

9. That it appears from the face of the information that the

public offense charged to have been committed by the defendant is based upon a statute obnoxious to and controverting the provisions of the Constitution of the State of North Dakota, namely: Section 13 thereof.

Dated January 30, A. D. 1912.

BALL, WATSON, YOUNG & LAWRENCE,
Attorneys for Defendant, Armour and Company.

Upon consideration of the foregoing motion duly submitted—the same is denied—Defendant excepts to such ruling.

CHAS. A. POLLOCK, *Judge.*

April 8, 1912.

[Endorsed:] Filed in the Office of Clerk of District Court, Cass County, N. Dak. Apr. 8, 1912. E. C. Geary, Jr., Clerk, by A. T. Comstock, Deputy.

28

Title.

Judgment.

The motion in arrest of judgment having been overruled, in the above entitled action; and Counsel for defendant stipulating that sentence may be imposed and judgment pronounced in the absence of any representative of the defendant except the Attorneys

And the Court being fully advised in the premises, Now, Upon motion of Arthur Fowler State's Attorney, It is ordered and the judgment of this Court is that you the defendant Armour and Company pay a fine of One Hundred Dollars, together with the costs of this action to which order and judgment counsel for defendant excepts.

Dated April 8th, 1912.

CHAS. A. POLLOCK, *Judge.*

[Endorsed:] 2584. Filed in the Office of Clerk of District Court, Cass County, N. D. 1:15 o'clock P. M. Apr. 8, 1912. E. C. Gearey, Jr., Clerk, by A. T. Comstock, Deputy.

* * * * *

29 & 30 (Statement of case covering the proceedings of trial court settled by stipulation.)

31a

Title.

Assignment of Errors.

1. The court erred in overruling the demurrer of the defendant to the information as filed and presented.

2. The court erred in overruling the motion of the defendant to dismiss the complaint made at the close of plaintiff's case. (Statement, pages 3 and 4.)

3. The court erred in overruling the motion of the defendant to dismiss the action made at the close of the entire case. (Statement, page 64.)

4. The court erred in overruling the motion of defendant for dismissal of the action at the close of the entire case. (Statement, page 65).

5. The court erred in finding in favor of the plaintiff and against the defendant, and ordering the defendant to appear and further answer and abide the order of the court, same being made by written opinion and order dated January 20, 1912.

6. The court erred in denying defendant's motion in arrest of judgment.

7. The court erred in rendering and entering final judgment against the defendant.

8. The court erred in denying defendant's motion for a new trial.

Specifications of Insufficiency.

1. The evidence is insufficient to justify the verdict and judgment in that the testimony fails to disclose the commission of any offense against the laws of the State of North Dakota by the defendant.

31 2. The evidence is insufficient to justify the verdict and judgment in that it affirmatively appears therefrom that none of the acts committed by defendant were contrary to any valid or constitutional law of the State of North Dakota.

3. The evidence is insufficient to justify the verdict and judgment in that it is clearly established by the evidence that the legislative act upon which the action is founded is contrary to and repugnant to the provisions of the 14th Amendment of the Constitution of the United States in that it denies to the defendant the equal protection of the law.

4. The evidence is insufficient to justify the verdict and judgment in that it clearly appears that the legislative act upon which the action is founded is violative of and repugnant to the provisions of the Constitution of the United States in that it attempts to punish the defendant for an act or acts wholly outside the state of North Dakota, and that act violates the commerce clause of the constitution of the United States.

5. The evidence is insufficient to justify the verdict and judgment in that it clearly appears from the evidence that the legislative act upon which the said action is founded is arbitrary and unreasonable, and deprives the defendant of property without due process of law.

6. The evidence is insufficient to justify the verdict and judgment in that it clearly appears that said act violates the right of freedom of contract secured to all citizens by both the constitution of the State of North Dakota and of the United States.

Statement of the Case.

The above entitled matter coming on to be heard in the District Court in and for the County of Cass, Third Judicial District, State of North Dakota, on the 9th day of January, A. D. 1912, before the Honorable Charles A. Pollock, Judge of said Court, sitting without a jury, as herein stipulated:

Arthur W. Fowler, Esq., State's Attorney of Cass County, North Dakota, and Edward Engerud, Esq., appearing for the State.

Messrs. Ball, Watson, Young & Lawrence and A. B. Stratton, Esq., appearing for the defendant.

Thereupon the following proceedings were had, counsel having recited the proceedings had up to this time as shown by the records and minutes of the Court:

Mr. WATSON: Some changes are to be made in the affidavit, by consent.

The COURT: That is, in the original complaint?

Mr. WATSON: In the original complaint.

Mr. ENGERUD: At this time I will move that by consent of counsel the information is amended so as to read as follows, omitting the title, which remains unchanged.

"To the District Court in and for said County:

Arthur W. Fowler, State's Attorney in and for said County of Cass and State of North Dakota, in the name and by the authority of the State of North Dakota, informs this Court that heretofore, to-wit: on the 8th day of September, in the year of our Lord one Thousand Nine Hundred and Eleven, at Fargo, in the County of Cass, in the State of North Dakota, Armour and Company, (which said Armour and Company was then and there a corporation organized and existing under the laws of the State of New Jersey) did

33 wilfully and unlawfully offer for sale and sell to one E. F. Ladd a quantity of lard, and not in bulk, which said lard was then and there put up, sold and delivered to said E. F. Ladd in a pail which then and there held more than two pounds and less than three pounds net weight of lard, to-wit, two pounds and six ounces of lard, and which said pail or container did not then and there have or display on the face label thereof the true net weight of said lard in even pounds or whole multiples thereof, but expressed the weight of the lard in pounds and ounces.

This against the peace and dignity of the State of North Dakota, and contrary to the form of the statute in such case made and provided."

The COURT: Now, this amendment practically makes a new information.

Mr. WATSON: Yes, I am just coming—

The COURT: Do you desire to demur to that?

Mr. WATSON: We do, Your Honor, and will ask that the demurrer heretofore interposed against the complaint in its original form may be now considered by the Court as presented to the Complaint in its amended form.

The COURT: Well, we will permit that, and you don't care to argue that?

Mr. WATSON: And that the form of our demurrer may be as heretofore made in writing to the complaint as originally filed.

Mr. ENGERUD: Well, we just simply stipulate the original demurrer stands as the demurrer to this.

The COURT: I don't suppose you care to be heard on that?

Mr. WATSON: No.

The COURT: The demurrer will stand as to this new information; that is, the demurrer to the other information will stand as the demurrer to this, and the demurrer is overruled and an exception saved.

Mr. WATSON: Now the defendant appears before the Court and pleads "Not Guilty" to the complaint as amended.

The COURT: Now you better put in your waiver of the jury.

Mr. ENGERUD: It is now stipulated in open court by the respective parties that a trial by jury be and the same is hereby waived and that the issues in said action shall be tried by the Court

34 without a jury, with the same force and effect as if a jury were empanelled and sworn.

The COURT: You may proceed.

E. F. LADD, called as a witness for the State, being first duly sworn, testified as follows:

Direct examination by Mr. ENGERUD:

Q. You live in this City?

A. I do.

Q. And on or about the 8th day of September, 1911, in the City of Fargo, in this county and state, did you purchase from Armour and Company a pail of lard?

A. I did.

Q. I show you this pail of lard marked Exhibit "A" and ask you if that is the pail of lard you purchased on that occasion?

A. It is.

Q. And who was the person in charge of the establishment from whom you purchased it?

A. T. J. Sirrs.

Q. This pail and the contents are now in the same condition in which they were at the time you purchased them?

A. It is.

Q. When you purchased it, what did you call for?

A. I called for three pounds of Armour's Shield Lard.

Q. And received the pail in question?

A. I did.

Q. And how much did you pay for it?

A. Thirty-five cents.

MR. ENGERUD: Now, I believe it would be stipulated that Mr. Sirrs, from whom Mr. Ladd purchased the pail in question, was at the time the manager or employe of Armour & Company, in charge of its business establishment in the City of Fargo, and that Armour and Company was then and there a corporation?

MR. WATSON: It is so admitted on the part of the defendant.

MR. ENGERUD: Organized under the laws of New Jersey. And that is our case.

Cross-examination by Mr. WATSON:

Q. You never have opened this can of lard, Exhibit "A"?

A. No.

Q. And it is now just in the form in which you bought it?

A. It is.

35 Q. And it had upon it when you purchased it the sticker?

A. The sticker?

Q. Showing the net weight?

A. The sticker that is now there, yes, sir.

MR. ENGERUD: State offers Exhibit "A" in evidence. Any further examination?

Cross-examination continued by Mr. WATSON:

Q. You have related all the conversation that occurred between yourself and Mr. Sirrs in connection with the sale of this Exhibit "A," have you, professor?

A. I do not think I have, all of the conversation.

Q. I mean all of the conversation in relation to the purchase of this pail of lard?

A. Yes, sir, unless you would refer to the statement made by Mr. Sirrs, as I now recall it, that he was selling these in small, medium and large containers.

Q. That is, that he had three different sizes of pails?

A. I infer so, yes, sir.

Q. And this was—this pail that you brought here is the one you bought?

A. It is.

Q. And there was no other conversation between you in relation to the purchase of the pail of lard except what you have now detailed?

A. Not that I recall at this moment.

Q. You paid you say, thirty-five cents for this pail?

A. I did.

THE WITNESS: Your Honor, I think I want to make one correction if permissible. I think there was slightly more conversation between myself and Mr. Sirrs. I requested I be furnished a receipt.

Q. Did Mr. Sirrs furnish you with a receipt?

A. He did.

Q. You are the Pure Food Commissioner for North Dakota, are you, Professor Ladd?

A. I am.

Q. How long have you held that place?

A. Nine years.

Q. The label on this can doesn't express the net weight in even pounds or multiples of even pounds, Professor Ladd?

A. It does not.

Q. What does the label show the net contents to be?

A. Two pounds and six ounces.

36 Q. And this pail was purchased by you in view of making the present test case in regard to the validity and constitutionality of this law?

A. It was.

Q. And you observed, of course, this label when you made the purchase?

A. I did.

Q. And you observed that the net contents as stated upon the can which you thus bought did not express in even pounds the net weight of the lard?

A. I did.

Q. And as you say, you bought that for the purpose of making this test case in order that we might find out about the validity and constitutionality of this law?

A. I did.

Mr. WATSON: That is all, Professor Ladd.

Mr. ENGERUD: That is all.

State rests.

Mr. WATSON: May it please the Court: The defendant now moves the Court to dismiss the complaint herein for the following reasons:

1. Because the complaint as amended herein does not state facts sufficient to constitute any offense or crime under the laws of the state of North Dakota.

2. Because the said Chapter 236 of the Laws of 1911 does not penalize the offering for sale or the selling of lard in manner and form as the same was sold in this case, the only thing which is penalized in said statute being the putting up of said lard in form as required in Section 2 thereof.

3. Because the said law is obnoxious to the provisions of the Fourteenth Amendment of the Constitution of the United States, in that it denies to the defendant herein the equal protection of the laws. Also for the reason that it specifically denies to the defendant the equal protection of the laws in this: That the said act does not by its terms embrace and cover all pastry shortenings which are in the market and which are commonly used for the same purposes for which lard, lard compounds and lard substitutes are used, and by reason thereof the said law places a burden, or attempts to place a burden upon the defendant in respect of the products mentioned in said act which is not placed upon other pastry shortenings which are on the market and extensively used for like and the same purposes.

37

4. Also for the reason that the said act violates the provisions of the Federal Constitution in that it attempts to punish the defendant for an act or acts which were committed wholly outside of the State of North Dakota, to-wit, the act of putting up lard in pails the contents whereof are not measured by a pound or even multiples thereof, and it is beyond the competency of the legislature of North Dakota to make criminal such acts when they are done outside of the limits of the State of North Dakota.

5. Also because it interferes with and is contrary to the laws of the United States, in that it attempts to make unlawful the bringing into the State of North Dakota of lard, lard compounds and lard substitutes in other than packages containing an even number of pounds or multiples thereof, and thereby violates the commerce clause of the Constitution of the United States.

6. Also because the said act violates or attempts to violate freedom of contract secured to all citizens by both the Constitution of the State of North Dakota and the Constitution of the United States:

The COURT: I suppose that is one of the motions you want me to overrule, isn't it?

Mr. WATSON: We make it at this time to preserve our rights. Of course, all these things will be brought up in the argument.

Mr. ENGERUD: It strikes me it is a motion that ought to be argued, because it involves the merits directly and unless—and I assume such to be the case—that there will be no dispute as to the transaction as disclosed by the State's evidence—

The COURT: I think, Judge, I will overrule it.

Mr. ENGERUD: If that is true, the constitutionality of this law must be determined upon the law and not by weighing evidence.

The COURT: We have the witnesses here and we will hear the case. When you have your testimony in, we will hear it
38 upon all its phases. The motion is overruled and an exception is saved. If you are ready now to introduce your testimony, we will adjourn until two o'clock. Are there any other preliminary matters?

Mr. WATSON: I don't know, your Honor, of anything else.

Recess to 2 P. M.

E. F. LADD, recalled by the defendant as part of his original examination, for further cross examination.

Cross-examination by Mr. WATSON:

Q. You mentioned, Professor Ladd, having taken a receipt from Mr. Sirrs at the time you bought Exhibit "A."

A. I did.

Q. Have you that receipt?

A. I have.

Q. Will you please produce it?

(Witness produces paper, which is marked Defendant's Exhibit 1.)

Q. Is Defendant's Exhibit 1 the receipt which you referred to?

A. It is.

Q. This describes the Plaintiff's Exhibit "A" which you received at that time and which was paid for by the thirty-five cents, as one small Shield Lard?

A. It does.

Q. I believe you said in your testimony that when you called for a three pound pail of lard that Mr. Sirrs said they didn't have that, but had a pail—or, what was your language?

A. He said that they were selling them as small, medium and large sizes.

Q. Selling lard as small, medium and large?

A. Yes.

Q. And then you asked for the small pail, did you?

A. I told him I would take a three pound pail, which I suppose he meant was a small pail.

Q. And then you obtained this pail which is in evidence?

A. I did.

Q. What kind of an establishment does Armour and Company maintain in Fargo, Professor Ladd?

A. That is the first time I have ever been inside of the place—the only time.

Q. It is a distributing—

A. Distributing place, I should say.

Q. What I mean, it is not a place for the slaughter of animals or for putting up of products of meat?

A. Not to my knowledge.

Q. They have no establishment of that kind in North Dakota, have they?

39 A. Others are better able to answer that than I am. I don't know. I don't know of one.

Q. Do you know where this package, Plaintiff's Exhibit A, was put up, Professor?

A. I do not.

Q. You could tell from this label, that is, upon the condition—if you had the data from the Department of Agriculture at Washington?

A. No sir, not necessarily.

Q. It says on the bottom of the face label, "U. S. Inspected and Passed under the Act of Congress of June 30, 1906. Establishment 2-C." Would that establishment, under the rules of the Department of Agriculture, be registered in Washington under that?

A. I couldn't say. They usually use a serial number. There is no serial number, so far as I could see.

— Don't you think the "Establishment 2-C" would be the serial number in connection with the name of Armour?

A. Not the serial number.

Q. Not the serial number?

A. No.

Q. You would be able, however, by consulting the records at

Washington, in connection with Armour's name, to determine the factory at which it was put up?

A. Provided they would give me the records, but they haven't always done that.

Q. But it would be recorded at Washington, wouldn't it?

A. I presume it would be.

Q. That would be the method—in other words, by pursuing the number you could find out where that lard was put up?

A. If they could get access to the records.

Q. But the records are at Washington?

A. I presume so. Serial numbers are. Whether these are, I couldn't say.

Q. It would be only a question of getting at those records?

A. Yes sir.

Q. You know, Professor Ladd, that this distributing house in Fargo maintained by Armour and Company is not engaged in the retailing of pork products, do you?

A. I have never found them doing so.

Q. You have never found them doing so. You know of fact that they only sell to the wholesalers, do you?

40 A. That is the information I have, yes sir.

Q. And this pail of lard, plaintiff's Exhibit A, was just sold to you as a matter of personal accommodation?

A. I don't know as to that. That would be an interpretation of the law.

Q. Well, Mr. Sirrs so stated to you when you applied to buy it, did he?

A. I don't recall that he made that statement.

Q. Don't you recall he said, "We don't sell at retail, but of course you being the Pure Food Commissioner, if you want this we will let you have it?"

A. He may have made the statement, but I don't recall. I should have taken it anyway and taken my chances.

Q. You paid thirty-five cents for this pail?

A. I did.

Q. What is the ordinary price of that pail of lard at a retail store in Fargo?

A. Well, I haven't been purchasing the lard. I think about fifty cents.

Q. In other words, you paid for that pail of lard just what the retailer would have paid if he had gone for it—bought it by the case—did you?

A. Presumably.

Mr. WATSON: We offer Defendant's Exhibit 1 in evidence in connection with the cross examination of Professor Ladd. That is all.

Mr. ENGERUD: That is all.

The COURT: What does "Shld" mean?

Mr. WATSON: Shield.

Mr. STRATTON: That is the name of the brand. It is an abbreviation of the word "Shield."

Mr. WATSON: It is right there, your Honor. That is the original

one that was sold. It is one of the brands of lard. I presume, Your Honor, it may be considered that we have now renewed our motion after the further cross-examination of Professor Ladd?

The COURT: Let the record so appear, and the motion is overruled. Exception by the defendant.

R. C. HOWE, called as a witness for the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. WATSON:

Q. Your name is R. C. Howe?

A. Yes sir.

41 Q. What is your age, Mr. Howe?

A. Forty-five.

Q. Where do you live?

A. Omaha, Nebraska.

Q. Are you connected with the defendant, Armour and Company?

A. I am.

Q. In what capacity?

A. General Manager.

Q. General manager of the plant at Omaha?

A. And Sioux City.

Q. Sir?

A. Omaha and Sioux City.

Q. Omaha and Sioux City. How long have you been connected with Armour and Company?

A. Thirty-two years.

Q. Where did you begin your service with the Company?

A. Chicago.

Q. In what capacity?

A. Message boy.

Q. At what age?

A. About thirteen, I think.

Q. Have you been connected with the company continuously from that time down to the present day?

A. Continuously.

Q. In what different capacities?

A. From—I filled all the positions up to the position of assistant general superintendent at Chicago and general manager here, and representative abroad for a while in Australia, Europe and South America.

Q. In a general way, what are your duties as general manager of the plants of this company at Omaha and Sioux City?

A. Looking after the cost, the buying and selling and prices of stock, buying and selling of products, general management of the business.

Q. Considered in the whole, has your experience with this company familiarized you in a general way with the business of Armour and Company in all of its branches?

A. In all, yes sir.

Q. Has it familiarized you in particular with the subject of putting upon the market and the selling of lard, lard compounds and lard substitutes?

A. Yes sir.

Q. How large an establishment was Armour and Company when you first went into its service?

Mr. ENGERUD: Objected to as irrelevant and immaterial.

The COURT: I think I will try this under the Newman Act, although it isn't triable that way.

Mr. WATSON: I will try not to abuse it, Your Honor, but I want to give you a good idea of this whole business, the way it has grown up.

42 The COURT: Of course, properly speaking, I should rule one way or the other upon these objections, but I think I will let it be understood, unless you get too far out of the way, which I presume you won't, I will overrule the objections and an exception is saved in each instance.

The question was read by the reporter.

A. We had a packing house at Chicago. We killed nothing but hogs. Our capacity at that time, I think, was about 2,000 hogs a day. Mr. Armour was interested with other people, John Plankinton of Milwaukee and with two of his brothers, in a small house in Kansas City.

Q. How many plants do Armour and Company own and operate at the present time?

Mr. ENGERUD: Same objection.

The COURT: I suggest a general objection, Judge, that would cover all this, if you wish, for the purpose of the record, unless you desire to object to each question.

Mr. ENGERUD: I won't want to make the record unnecessarily voluminous, and of course my view of the situation is that, though while the Court of course indicated it was going to hear all the evidence, it seems to me it is going to carry us far afield and away from the real point at issue, and after all it is bound to come back, as it always does in these cases and in every case of this character that has ever been on record, that it will simply be a question as to the constitutionality of the law as based upon those facts of which the Court takes judicial notice; and if I may be permitted to suggest, it seems the question which is before the court—and that, of course is assuming that the prima facie case, on the assumption that the law is constitutional, as already made by the State, will be undisputed—and as was well said by the Supreme Court—Appellate Court of New York, and also by the Appellate Court of New Hampshire in similar cases of this kind, where this sort of evidence was gone into or sought to be gone into—it said it involved the trial of the constitutionality of the law by jury and the constitutionality of the law would depend upon the preponderance of the evidence

43 a given case, and a different result might be reached, dependent upon the view that the jury took of the amount of evidence which either side might be able to introduce, and

course the absurdity of such a situation is apparent at a glance, and—

The COURT: My understanding was when you presented your demurrer that there would be evidence to be offered and therefore the demurrer was simply overruled pro forma and you were required, or they were required to put in the proofs, or rather, the State was.

After argument by Mr. Engerud on his objection.

The COURT: Perhaps we are getting a little wide of the mark we started to cover. My only suggestion was this; that if we can save a lot of time here by your making an objection which would stand to all that evidence, it would save interrupting.

Mr. ENGERUD: I will endeavor to make an objection and then I will only interpose the specific objection when I think there is a departure from the class. I simply wanted to state to the Court what I thought.

The COURT: Can you do it on this question?

Mr. ENGERUD: Yes, it can be understood that all the evidence last objected to is admitted under the same objection and ruling, and an exception is allowed.

The COURT: So understood.

Mr. ENGERUD: And I will interpose an objection if there is a departure from the general line.

The question was read by the reporter as follows:

Q. How many plants do Armour and Company own and operate at the present time?

A. Armour and Company and their connections probably operate seven or eight packing plants.

Q. Where are they located?

A. There is Chicago, East St. Louis, Fort Worth, Kansas City, Omaha, Sioux City, and they have connections with New Brighton.

Q. Where is that?

A. New Brighton, and there may be others that I don't know about.

Q. Do they have any in North Dakota?

A. We have none in North Dakota.

Q. Never have had any here?

A. They never have any.

Q. Armour and Company make any lard in North Dakota?

A. They do not.

44 Q. Ever made any here?

A. They never have.

Q. Please examine the Plaintiff's Exhibit "A" and state where that package of lard was manufactured and put up.

Mr. ENGERUD: Objected to as irrelevant and immaterial. Overruled. Exception.

The COURT: Go ahead. You answer all questions.

A. This was put up at South Omaha, Nebraska.

Q. How were you able to tell that—from looking at the label?

A. By the establishment number, 2-C.

Q. Is that registered anywhere?

A. It is registered in Washington, D. C.

Q. In the Department of Agriculture?

A. In the Department of Agriculture.

Q. Pursuant to the laws of the United States?

A. Yes sir. They issue——

Q. Is any information published in the bulletins of that department from which one seeing the bulletin could identify the place where this pail of lard was put up?

Mr. ENGERUD: Objected to as irrelevant and immaterial.

Overruled. Exception.

A. They issue bulletins regularly giving the names and numbers, the locations of all establishments. We have government inspection, and they are open to the public if they are asked for.

Q. Professor Ladd spoke about this—about the absence of what he described as a serial number on this face label?

A. The serial number is on there, "2-C." Each establishment is designated by a number. If there is more than one establishment owned by one corporation, then they follow by letter, such as Armour and Company's, 2-A—one is A, another B, another C, and so on.

Q. And the serial number indicates this lard was put up at South Omaha?

A. South Omaha, No. 2-C.

Q. What is the net weight of the contents of that package?

A. Two pounds, six ounces.

Q. When you entered the business of Armour and Company, in what form was lard put up and sold to the trade?

45 A. It was put up in tierces, containing——

Mr. ENGERUD: Same objection; irrelevant and immaterial.

Overruled. Exception.

A. (Continued). —340 to 350 pounds, average, net.

Q. Those tierces were made of wood, were they?

A. Wood tierces, yes sir.

Q. Large barrels or casks?

A. They are cases, 32 inch stave and 21½ inch head.

Q. That is known in the trade as a tierce?

A. As a tierce, yes sir.

Q. Has that method of marketing lard obtained ever since your connection with the company down to the present time?

Mr. ENGERUD: Objected to as irrelevant and immaterial.

Overruled. Exception.

A. Yes sir.

Q. Large part of the lard product of Armour and Company today put out in tierces?

A. There is a percentage of it put out in tierces, but a large percentage is put out in smaller packages.

Q. When you first went with Armour and Company was the method that you pursued the one in common use among all other packers at that time, as to marketing of lard?

Mr. ENGERUD: Objected to as irrelevant and immaterial. Overruled. Exception.

A. Same all over.

Q. In other words, at that time the retailer bought tierces of lard, did he?

A. The retailer bought a tierce of lard if he could use it, or if he put in a special order he got a barrel of lard.

Q. What is a barrel of lard?

A. A barrel is a package of about a 28-inch stave and probably 19-inch head—hold—about 220 or 230 pounds.

Q. Metal or wooden barrel?

A. They were all wooden packages at that time.

Q. Then, during those times, the consumer in purchasing lard at a store would buy it and it would be taken from a tierce or a barrel, would it?

A. From one of those wooden packages, yes sir.

Q. How long did that method of distributing and getting
46 into the hands of the producer lard from the packing house continue, or rather, when did there begin to be any change in the method of marketing the product?

A. I think probably five or six years after my connection with the firm we started to put it out in packages first, and I think paper packages, treated paper packages, and after that tins were put out.

Q. Will you tell the Court what the objections were, if there were any, to putting this product upon the market in the form of tierces and barrels, having it retailed out to the trade in that way?

Mr. ENGERUD: Objected to as irrelevant and immaterial. Overruled. Exception.

A. Well, the tierces were not a sanitary package. They laid around a market or grocery store and became full of dirt and sweepings of the place, insects dropped into them, and there was always sediment gathered at the bottom of the tierce, and in the summer time in wrapping the lard in paper, it was unsightly and greasy and hard to handle. We looked about for some more sanitary way, and we were improving on our lard products at all times, cooking of it, rendering of it, and cleanliness of it, so we decided we would establish, if possible, a brand which would go to the home of the consumer, and the consumers after they had used the lard would remember the name and go to their market and call for it; in other words, we would advertise through a brand which would make its own call.

Q. Now, the first container, you say, that you used for trade of that sort, was a paper container?

A. I think so—it is long ago. I think a paraffine paper container. I don't think it was satisfactory. In hot weather the lard soaked through it and it had a greasy appearance. I am not positive about that.

Q. At any rate, that method of handling the product was discontinued, was it?

A. Simply on that account. It was unsightly after the lard stood

in it for a long time and then it wouldn't stand shipment as tin would, being knocked about on the trains.

Q. So that the tin pail followed the paper one, did it?

A. Yes, as the most available and most sanitary package we could find.

47 Q. Could you tell us about when it was that the handling of lard in pails became general among the packers of the United States?

Mr. ENGERUD: Objected to as irrelevant and immaterial. Overruled. Exception.

Q. I don't ask definitely. Just as near as you can remember it.

A. I think it was probably in 1884 or 1885, but they didn't become general I think. N. K. Fairbanks first started. I remember going over there and hiring their lard man, George M. Stern. They put out a product known as Cottolene, they put out a lard product at that time, and they also bought lard in tierces and dumped the tierces and filled it into smaller packages. They made lard oils and bleached them and they had a process of bleaching at that time which we tried to get and tried to learn. We didn't make a success. We built some plants and things of that kind. So we engaged one of their men to build a refinery for us, Mr. Stern. I went over there and hired him.

Q. Then N. K. Fairbanks and Company were pioneers in America in putting out lard in tin pails, were they?

A. I think they started it.

Q. They started it. And your concern took it up about 1884 or 1885?

A. Right afterwards; just as soon as we found their stuff on the market we had to do it.

Q. How general has that method of marketing lard become among the packers of America?

Mr. ENGERUD: Objected to as irrelevant and Immaterial. Overruled. Exception.

A. I don't know a packer today that doesn't put up lard in tins.

Q. Now, what are the distinct advantages of marketing the lard in the tin pail? Just recount them, different ones, to the Court.

Mr. ENGERUD: Objected to as irrelevant and immaterial. Overruled. Exception.

— Well, in the first place, from our standpoint, it puts a product on the market which people will call for. It establishes our name with the housewife. We don't need to cover the ground so often
48 or so much with salesmen. The dealer is compelled to keep our brand, because the people call for it, and if we can keep the quality up to the requirements of the trade, we are sure of an outlet for our product. If we put it out in tierces, the housewife couldn't tell when she went into the market or grocery whether she got Armour's, Swift's, Morris's, or whose it was. Now she does, and insists on getting it with that brand.

Q. Now, those are the advantages to the packer—some of them which accrue to the packer. Now, tell us what are the advantages, if any, to the retailer in handling this way rather than in tierces?

A. In the first place the retailer puts this pail on his counter or shelf; it is sightly and sanitary; doesn't deteriorate in nearly as short a time as it would if exposed. He has no waste here and he has no loss. A man using tierces of lard will have a loss of three to seven pounds a tierce; one or two per cent in shrinkage and waste.

Q. By evaporation?

A. No, soaks into the wood—the oil does—the absorption of the wood itself, and in scraping out the tierce he cannot scrape all of the surface, and you take a surface of stave, thirty inches deep and twenty-one inches in diameter, or sixty-three or four inches around, there is quite a little lard will stay in there that his clerk wouldn't take off.

Q. And it would be a loss?

A. That would be loss, and besides it is unsanitary and didn't give satisfaction.

Q. What about the deterioration in quality of lard sold from a tierce while it stands in the grocery or the meat market awaiting sale?

A. Well, that is exposed to all the elements, dust, dirt, and also to the insects and sweepings, clearing up around, and besides that, any article of lard that is made as this lard is today, cooked at a very low temperature to get rid of all possible animal flavor, will not stand as it would if cooked at a very high temperature under pressure, and by closing it in practically airtight packages it retains its flavor and doesn't get rancid in nearly as short a time as it would the other way.

49 Q. What would you say the effect of this method of handling the lard has upon its freshness, wholesomeness and bright appearance?

A. I don't think there is any comparison. I don't think there is any house-wife today, given her choice, would go back to the old method.

Q. Why?

A. Simply because this is wholesome, clean and sanitary, and this will not pick up the odors, even around a kitchen—places of that kind, or around a store. Lard exposed, put with vegetables, things of that kind are bound to affect it, especially high-grade lard.

Q. What is the effect of air upon lard which is exposed as it would be in open tierces?

A. Well, the effect of a warm temperature on lard would have the effect of making it rancid in time.

Q. What effect, if any, does this method of handling lard have in protecting the customer in his purchases from a dishonest or careless dealer in the matter of knowing that you are getting what you are paying for in the way of brand?

A. These pails cannot be used again—that is, in inter-state trade, with the establishment number on them, and as I said before, if

the buyer gets a pail of Armour's Helmet lard or Armour's Shield lard, or Simon Pure, they know they are getting the best and know they are getting always a uniform article. In making pastry or anything of that kind, they know just what to use and how much of it, and they know what the weight is; put on with a sticker, the weight is marked on each package.

Q. In other words, buying one of these packages, you have the assurance—the purchaser does—that it is just what it purports to be?

A. That is it. We try to state just exactly what is in the package.

Q. But if you go to the store and buy lard from a tierce, the purchaser doesn't necessarily see or know the actual maker of that lard, does he?

A. Just as I said before; they might call for Armour's lard, but if the retailer didn't have it he wouldn't say so. He would give what lard he had, if it was in bulk.

Q. That is, he could do so.

A. He could do so, and they wouldn't know the difference until they used it.

50 Q. The opportunity, in other words, for deceiving the public would be very much greater when lard is sold in bulk than it would be when sold in the pail?

A. Very much greater. There is no chance now to deceive them.

Q. You consider that is a distinct advantage for the purchaser?

A. There is no question about it.

Q. In what sized packages do Armour and Company put up their lard? Now just begin at the lowest.

Mr. ENGERUD: Objected to as irrelevant and immaterial. Overruled. Exception.

A. Begin with what we call our small, medium and large buckets and large tins.

Q. Now, the small one is identical with Plaintiff's Exhibit A, is it?

A. It is.

Q. That is the smallest tin of lard that you put out?

A. That is the smallest commercial tin. We turned out smaller tins simply to introduce our products into newer territory. For general commercial purposes that is our general commercial size.

Q. And how much does that small pail weigh, gross?

A. It is supposed to weigh three pounds.

Q. And how much—what is the net weight of the contents?

A. That is two pounds, six ounces, I think.

Q. Now, what is the next size pail?

A. The next size pail is the medium.

Q. And how much does that weigh, gross?

A. Weighs five pounds.

Q. And about what is the net weight of the contents?

A. Four pounds and two ounces.

Q. What is the next size tin pail?

A. The next is a ten, gross.

Q. That weighs ten pounds?

— Ten pounds, gross.

Q. And how much would that weigh net?

A. I have forgotten just what the net weight of that would be.

Q. About eight pounds?

A. O, yes, more. It is about nine pounds. Almost nine pounds, eight pounds and something.

Q. Eight pounds and something. Now, all of these packages that you have described, so far, are what are known as flared pails, are they?

51 A. All with the exception of Simon Pure are made in a flared pail.

Q. The Simon Pure is a straight up and down can, is it?

A. It is.

Q. This one (indicating can on table)?

A. That is the one.

Q. Now, the Simon Pure lard is a leaf lard, is it?

A. Nothing else used in it except pure leaf.

Q. And all cans which contain Simon Pure Leaf lard are not flared but sides are vertical?

A. Straight sides.

Q. Then when you get up to the large size can——

A. Fifty pound gross can.

Q. Fifty pound. Now, when you get up to fifty pounds, you call that a can and not a pail, do you?

A. Can.

Q. You call that a can?

A. Yes.

Q. And that weighs fifty pounds?

A. Yes.

Q. Is that gross weight?

A. That is gross weight.

Q. Now, is the fifty-pound can the largest container in which you put out lard?

A. With the exception of a galvanized iron container which is put up for bakers. I might tell you why that was done. The bakers found that lard put up in metal containers—they had less loss in shrinkage, which I spoke of a minute ago. They used to buy all lard in tierces. Now they have asked us to put it up in these metal containers.

Q. What size are they?

— They hold about the same as a tierce; around three or four hundred pounds.

Q. Now, outside of the ones you have mentioned, including those specially put up for bakers, do you regularly put up and on to the market any other size tin containers of lard than those you have described?

A. No.

Q. Now, about the fifty-pound tin can which you have just referred to, what is the next size container that you put out?

A. Smaller or larger.

Q. Of Lard?

A. Larger or smaller?

Q. Larger; next larger one.

A. We have a tub which will hold sixty pounds and another tub which will hold eighty pounds.

Q. Are those both wooden tubs?

A. They are wooden tubs.

Q. And what is the next size container—the barrel?

A. Well, we have a half-barrel. Very few of them, if any, are sold in this country. That holds about 100 to 120 pounds.

Q. That is mostly for export trade?

— That is mostly for export trade.

52 Q. *That is mostly for export trade?*

A. *That is mostly for export trade.*

Q. That is wood also?

A. That is a wood package.

Q. Then what is the next size package?

A. Then we go from that to the tierce—few barrels, but very few.

Q. How much does the barrel hold?

A. A barrel will hold about 250 pounds, I should think, net.

Q. That is also wood, is it?

A. That is of wood.

Q. Then what is the next size?

A. The tierce.

Q. And how much does the tierce weigh?

— About 340 to 350, net.

Q. No two tierces are ever the same, I suppose?

A. No two tierces ever alike.

Q. What is the regular size on the Board of Trade of Chicago?

A. A man selling lard on the Board of Trade—

Mr. ENGERUD: Same objection. Irrelevant and immaterial. Overruled. Exception.

A. (continued). —who sells 250 tierces of lard is liable for 85,000 pounds of lard. Weights are made on that basis, either buying or selling.

Q. That is where the price is fixed, is it?

A. Price is fixed on that weight.

Q. Now, you have described, have you, in your testimony, all the different sized packages of lard that are put out by Armour and Company?

A. Yes sir, I think all except some special lards put up on special orders.

Q. Yes, but I am referring—

A. General trade—

Q. To the lard put out commercially.

A. That is all.

Q. And you have also described the character of the containers used in putting them out; as to whether metal or wood, I mean?

A. Yes sir.

Q. Now, I will ask you if—how the custom of the trade grew up in the matter of the employment of net or gross weights in respect of the tin pails and the tin cans up to fifty pounds, which you say is the largest which you put out in the form of tin? What has been from the beginning of the business the established use, usage and custom in regard to the weight?

A. Always gross weight tins, from the time that we started.

Q. That has been true of Armour and Company?

A. Of Armour and Company and everybody else.

Q. Everybody else? You know what you are talking
53 about when you make that statement?

A. I do, positively.

Q. Now, what has always been the custom, from the beginning of the trade, in respect of the wooden tub of sixty pounds, the wooden tub of one hundred pounds—am I right about that?

A. Eighty.

Q. The other tub of one hundred pounds?

A. Eighty.

Q. Oh, of eighty pounds—beg pardon; wooden tub of eighty pounds; the wooden barrel and the tierce, in respect of its being put under net or gross weight?

A. That has always been put out under a net weight.

Q. The business as you have already testified, originally was handled in the larger containers—tierces?

A. Yes sir.

Q. And barrels. The putting out of lard in the smaller containers was an evolution in the business and a later development of it, was it?

A. It was.

Q. You have already detailed at some length the advantages of marketing this product of lard in the form of containers rather than in tierces. Now, I will ask you, generally speaking, Mr. Howe, what the comparative expense is as to the packer in putting out his product in tin pails as compared with putting it out in tierces?

Mr. ENGERUD: Objected to as irrelevant and immaterial.

Overruled. Exception.

A. Take for instance the medium size pail—

Q. Just broadly speaking I am asking now?

A. That medium sized pail costs us 73.40 a thousand. On the weight of lard that is in it that means about a cent and a half or little over a pound. Then there is an extra cost of from $\frac{5}{8}$ to $\frac{3}{4}$ ¢ a pound, the extra labor in handling, crating, putting up, over the old tierce method, which would make it about $2\frac{1}{4}$ ¢ a pound extra cost, I should think. That is very close.

Q. That is to say, if you were going to market 1,000 or 10,000 pounds of this lard, selling it to retailers or people who wanted to buy, it would cost you substantially $2\frac{1}{2}$ ¢ a pound more to put it out in the form of these tins than it would to put it out in tierces?

A. About $2\frac{1}{4}$ ¢ as close as I can figure it.

Q. About $2\frac{1}{4}$ ¢?

A. Yes sir.

Q. Then, I expected only a general answer. I understand that means of the average pail?

54 A. On the larger pail it would be less in proportion to the amount it would hold, but the family size pail—on a ten pound pail it might be, say 2¢, a quarter of a cent less, and the twenty another eighth of a cent less, because a man in filling it can fill this pail in practically the same time as he can the other. He has to be more careful in weighing a smaller package, and filling, and handles practically the same number of packages in a day. He can fill a tierce in practically the same time, because that has a larger filler.

Q. I will just ask you a little about that, Mr. Howe. In your packing establishments there are certain floors which are given over to the putting up of lard in these packages, are there?

A. Yes sir.

Q. And the lard is brought to that room in metal pipes and is brought there in a liquid form?

A. Yes sir.

Q. And there are tables upon which cans are placed and into which the melted lard is drawn?

A. There are scales on these tables. The lard is drawn off by men who stand there.

Q. And the different sized chutes there deliver the lard in different ways?

A. They regulate the openings according to the size of the package filler.

Q. Now, you say the expense of drawing off and filling a tierce of lard wouldn't be much more than filling of one of these cans?

A. Very little more, if anything.

Q. And it takes more labor, does it?

A. The one is 340 pounds and the other is five. That takes a lot more labor in handling. With a tierce, the bung is driven in and it is rolled off, and this has to be carried carefully so it won't spill; got to be set; the summer top has got to be put on. That is not opened until the consumer gets it.

Q. When you first put out tin pails, Mr. Howe, how many covers were on them?

A. Originally had one outside cover.

Q. That corresponds to this loose cover that lies here?

A. Outside cover.

Q. Then, in the next place, when you ship these pails of lard out from the packing establishment, how are they sent out—in what form?

A. Well, they are shipped—put up in crates. These pails are put in crates and boxes. Some trade demand boxes and some crates. Some railroads insist on boxes in some territory where they get rough handling.

Q. You can't ship them loosely in a car?

55 A. Couldn't; they wouldn't accept them. Anyway it wouldn't pay to do it because the cans would be dented—knocked about. It wouldn't be feasible.

Q. It is necessary to crate them, is it?

A. Yes, sir.

Q. And that means, put up in these packages you have to crate them. What are these; wooden crates?

A. Wooden crates.

Q. How are they built in respect of size?

A. They are built to hold of the large size they hold six, of the medium they hold twelve, and hold of the small twenty—twenty tins.

Q. Are they fitted so that the exact size of the present cans will just fill a case?

A. We contract for lumber for those cases for a year and the lumber is all sawed to fit each size and put together in our plants, with the exception of Chicago. They buy theirs already made up. At the other places we put them up ourselves.

Q. Is there any spare or waste room left in the crate after filling it with cans?

A. Made as tight as possible to prevent knocking together.

Q. Could you put any larger size in the crates without changing the crates?

A. Impossible to do it. It would mean having to have more lumber for crates.

Q. That costs something—to buy crates?

A. We buy the crates by the thousand feet of lumber the same as any lumber. The larger the box, the larger the board has to be they cut the wood from.

Q. And the larger the board the more it costs?

A. The larger the board the more it costs per thousand.

Q. Now, what was your experience in the early stages of sending out lard with the pail which had upon it a single cover?

A. The cover would be knocked off; dust would get under it; it never fit tight and the lard wouldn't keep any better than it would in wooden packages, except it wasn't exposed to the dust flying around so much, and it was the tin pail people wanted; used it at home; used it for different purposes. Workingmen carried their lunches in it; used for carrying milk; to keep milk in the refrigerator—eggs, used it for a dozen and one different purposes.

Q. Yes, But I wanted to go back for a moment to the objections which appeared to the method of using only one cover; what happened if the crate containing the dozen or twenty of these tin pails, in the course of its transportation over the railroad or in the freight depots was laid upon its side so that the pail instead of standing up upright in the crate lay down on its side like that; what happened then?

56 A. In warm weather the lard ran out.

Q. Ran out?

A. Yes, in hot weather.

Q. Was that the situation which resulted in the use of the double cover?

A. Yes, the trade called for it in lots of places and we had to put in a great many claims and complaints so we decided on putting

this cover on, and that goes on not only now in summer time but also in winter.

Q. In what way is the inside cover put on—by hand or machinery?

A. Put on by machinery. It is set by hand and a machine turns this edge in.

Q. That is done after the pail has been filled with lard?

A. After it is filled.

Q. Is that almost an air-tight package as it is?

A. It is almost air-tight.

Q. You aim to make it as nearly air-tight without soldering as you can?

A. As near as we can. There is no solder on that can.

Q. No solder?

A. No sir. The crimping machine puts it on. A machine bevels the edge. That much turns down.

Q. Can you take it off by hand?

A. It is pretty hard to do. You have got to pry it off. It is put on there pretty solid.

Q. If it is knocked off can you get it back by hand?

A. I don't think you can; awful hard to.

Q. What is the purpose of this second cover?

A. To make the pail useful when it is empty and also keep the lard from exposure after you have taken the summer cover off.

Q. While the housewife is using it?

A. While the housewife is using it.

Q. If you didn't furnish a second cover she couldn't put the first in place?

A. Not back no, that is put on by machinery, crimped.

Q. Couldn't put it back?

A. Couldn't put it back.

Q. And if she is going to use lard in that container it must have a first cover?

A. It must be covered.

Q. And that is the reason for furnishing that lid, is it?

A. Certainly.

Q. How many brands of lard do Armour and Company put out?

Mr. ENGERUD: Objected to as irrelevant and immaterial. Overruled. Exception.

57 A. Put out Helmet, Shield—that is, of pure lards?

Q. Yes sir.

A. Helmet, Shield, Simon Pure, and then there are compounds which go out in the same cans, and Vegetole—those five.

Q. Are they represented by the cans which are *which are* before us here?

A. The cans are practically the same, yes.

Q. I mean are all the brands of lard, lard compounds and lard substitutes which are put out by Armour and Company—

A. Yes.

Q. —represented by cans which are here in the court room?

A. Yes, sir.

Q. And have you brought here also for the inspection of the Court the different sized containers or pails and cans which are used in all these different brands?

A. Those are all the commercial packages.

Q. So that the Court can see by inspection of them the line of cans that—and tin pails—in which your products are packed up and sent out, can he?

A. Yes sir.

Q. Now, the Simon Pure you have already stated is a pure leaf lard?

A. Yes sir, all the Simon Pure.

Q. Now, what is Shield?

A. That is a pure lard made from fat of a hog. May have a certain percentage of leaf in it, but not guaranteed to be all leaf lard—all pure lard.

Q. In other words, all the fat of the hog may be used in producing that product?

A. Yes sir.

Q. There may be some leaf lard in it?

A. Yes sir.

Q. But you don't represent it as being pure leaf lard?

A. There would be leaf, a little probably, back fat, fat off the ham, fat off bacon trimmings and things of that kind; all pure fat of the hog, but it isn't guaranteed to be entirely leaf, which the other is.

Q. It is a different product from Simon Pure?

A. It is a different product in more ways than that. Shield lard is made under pressure.

Q. What do you mean by made under pressure?

A. Cooked in a pressure tank with steam.

Q. What kind of pressure?

A. This is made in steel tanks, rendered under pressure of steam. The Simon Pure is cooked in an open top tank; jacketed. Steam don't come in contact with it at all and there is no pressure used; rendered at a very low temperature.

58 Q. Now, what is this brand known as Helmet?

A. That is a lard that is made of practically half leaf lard and cooked in an open kettle tank the same as the Simon Pure, which is entirely leaf. The process of cooking that is the same as the cooking of the Simon Pure. In other words, it is not cooked under pressure, which makes it different from Shield.

Q. Shield is cooked under pressure and Helmet and Simon Pure are not?

A. Yes sir.

Q. Which is more expensive of the two?

A. The open kettle is much more expensive.

Q. Now the next thing you show here is Vegetole. What is that; that a compound?

A. That is what we call Vegetole shortening. The name means

vegetable oil and oleo stearine, which is beef suet—beef suet and cottonseed oil.

Q. It is a combination of them?

A. It is a combination of beef suet and cottonseed oil—no lard in it.

Q. No lard in that at all?

A. No, it is not represented as a lard product.

Q. But goes under the name of Vegetole?

A. Yes sir.

Q. That is the trade name?

A. That is the trade name of it.

Q. Registered?

A. It is registered.

Q. And the label shows—

A. Shows the ingredients, and I think the percentage of each. At any rate shows the ingredients.

Q. Now what is this—

A. Oh, these; those are the five—there are five sizes of that.

Q. Then what is this remaining brand?

A. Known as White Cloud. That is a compound—substitute for lard. That is made of cotton seed oil and oleo stearine, the same as Vegetole, except it is bleached white.

Q. Bleached white?

A. The other is a yellow color. The labels show the color on the label.

Q. That is the color?

A. About the color.

Q. Vegetole, yellow in color?

A. Yes.

Q. Unbleached?

A. Unbleached.

Q. White Cloud is substantially the same product only it is bleached?

A. It is bleached white.

59 Q. And the proportions of oleo stearine and cotton seed oil are about the same in each of them, are they?

A. Practically the same.

Q. Practically the same? What is the comparative price or value of the two products?

A. Very little difference. Some trade demand one and some the other.

Q. Some prefer the yellow and some the bleached?

A. It costs a little more to make the yellow because we have to be careful about the color—the color has to be uniform. That stuff might not be right as to color and have to be worked over.

Q. Now, all these products on the table are also put up in sixty and eighty pound tubs?

A. If called for.

Q. In barrels?

A. And in barrels, yes, sir.

Q. And in tierces?

A. Yes sir.

Q. Are these products also sold generally from the tierces or barrels or tubs into which you say they are also put up, as well as in the tins?

A. The big part of our trade today is in tins.

Q. Yes, the larger part of your trade is, but you still sell the other way?

A. We are ready to sell them any way the people call for them.

Q. What I mean is this: If a man wants to go into a store and buy some of your Simon Pure leaf lard out of the tierce, he can ordinarily do it?

A. He can have it anywhere.

Q. And if he wanted to buy some of the Shield out of a tierce or barrel or wooden tub containing sixty or eighty pounds, he could do it?

A. He could do it. We quote different grades of lard in all packages to our trade. They can have anything they want.

Q. Well, is it true generally that all of these brands are to be found, in at least many of the markets, in the form of tierces or bulk lard, as well as in the pails?

A. Yes, it is true.

Q. And that it is open to the trade to buy it whichever way they please, is it?

A. Anyway they want to.

Q. And also open to the consumer to buy it in the same way?

A. He can call for it in the same way.

Q. Now, everything in the way of lard product touching which you have just been testifying is either a lard, a lard compound or a lard substitute, is it?

60 A. Well, there is no lard compound. There is a compound of cotton seed oil and oleo stearine, bleached white. We call it White Cloud on that account; the other compound of cotton seed oil and oleo stearine which is yellow, and the rest are all pure lards.

Q. Then you wouldn't call any of these lard substitutes. You would call them either lard compounds or——

A. We call them compounds. We don't mention lard at all.

Q. Don't use the word?

A. No.

Q. Well, they are made for use by the purchaser as a substitute for lard?

A. Yes, used for the same purposes.

Q. What? Pastry shortenings?

A. Used for pastry of all kinds used by bakers—not only those, but cotton seed oil—different vegetable oils are used for the same purpose.

Q. Do you know what Crisco is?

A. It is a cotton seed——

Mr. ENGERUD: Objected to as irrelevant and immaterial.
Overruled. Exception.

A. It is cotton seed oil product. It is made, I think, by the Southern Cotton Seed Company—made by Proctor & Gamble.

Q. Proctor & Gamble?

A. Proctor & Gamble.

Mr. WATSON: It is possible that we will have a few questions which we do not think of now. I thought we would save time by letting you go right on, and if we think of anything more, we would like the privilege.

Cross-examination by Mr. ENGERUD:

Q. When you—in the early period of the use of these small, medium—what is the third size?

A. Large.

Q. —Large size tin can, they acquired in the retail trade the terms of three pound cans, five pound cans, and ten pound cans, didn't they?

A. They were called 3's, 5's and 10's by the retailer.

Q. And that is what they were popularly known by originally, was it not?

A. I think maybe that is so, Yes.

Q. And in billing them out to the trade, they were—by the packers—they were designated as 3, 5 and 10 pound pails, respectively, were they not, originally?

A. They were sold—

61 Q. In the early period of the use of them?

A. They were sold originally on gross weights, yes sir; understood to be gross weight tins.

Q. Later on, after the agitation for—in the pure food movement, which resulted in statutes requiring the net weight to be expressed, the net weight was indicated on the cans?

A. We never changed the package at all. We merely added the weight sticker—weight—to it, where it was required.

Q. What was your object in placing the tag showing the net weight on the lard container or package on the rear portion of the package; different portion of the package from where the face label was?

A. We don't intend to put it around so far. Workmen putting it on are liable to put it on anywhere. It isn't supposed to be put on so as to mar the label and not to mar or obliterate the U. S. Inspection label which is on here, and we don't want the word "Pure" marked off; don't want our brand marked, or the word "Armour." The label should be, and is supposed to be put on the side just clear of the label.

Mr. WATSON: Indicating below and slightly to the left.

A. Just to one side, as closely as possible, but the workmen in turning out thousands of pails, stamping it on there, if it is not dry it might be pushed around, and we find they often go too far and have to caution them; but that should be placed closer. There is no intention to place it there any more than there would be to place it here.

Q. Now, Vegetole is a substitute for lard?

A. No, we do not sell it as a substitute for lard.

Q. I don't ask what you sell it for. I am asking what is its use. It is used as a substitute for lard.

A. You might as well say butter was a substitute for lard. It is used for the same purposes. We made Vegetole simply because the cotton seed companies made a similar product. We had to, because they go out and advertise, "Not made from pork; a vegetable compound." We naturally had to go out and do the same thing, to hold our trade.

Q. It is made and put out in the trade for the purpose of being used by those who desire it in place of lard—for the same purposes as lard?

A. It is used for the same purpose.

Q. And, of course, there is no lard in Vegetole?

A. No sir.

Q. Now, White Cloud, likewise, does not contain any lard?

A. No sir.

62 Q. And in fact contains no animal fats?

A. Oh, yes, we wouldn't have made either of those but that they contain animal fat. You notice "Oleo stearine." Oleo stearine is the butter tallow of beef. We make so much we have to have an outlet, and if we can use it in manufacture that disposes of that much of it.

Q. What did you say the animal fat which enters into the composition of White Cloud is?

A. It is the butter fat of beef. It is made from leaf fat from the inside of the animal, which makes oleo oil, which is manufactured into Butterine and shipped into many states, and we ship enormous quantities to Holland. The stearine is the hard matter left after pressing the oil from the fat. Stearine is the hardening part of it.

Q. Is that butter fat—what part of the animal is butter fat extracted from?

A. Well, it is inside fat of the animal, the same as leaf would be in the hog; a big part of it.

Q. This is from beef animals?

A. From the beef, yes.

Q. And in Vegetole is there any—

A. There is the same animal fat in that; same thing exactly.

Q. And in what proportion is the animal fat with the vegetable?

A. Oh, it is probably one-fifth, about.

Q. Now, that brand of lard which we call Shield; what are the constituents of that?

A. That is a standard pure lard, cooked under pressure.

Q. And of what parts of the animal is the—from what parts of the animal is the lard extracted?

A. That would be from all parts of the animal; that is, that lard could be made of—fat parts of the animal.

Q. Including the intestinal fat?

A. The intestinal fat—the government—that is, which is on the

intestines, is kept separate entirely. That is all put up under government inspection.

Q. Intestinal fat—doesn't that enter into Shield lard?

A. Well, what we call ruffle fat, where the intestines are attached fat off that goes into lard. That is under government inspection and is thoroughly washed and cleaned the same as the inside leaf lard is from the inside of the animal; just the same.

Q. And about what proportion of what may be termed leaf lard enters into the composition of Shield lard?

A. There is no specified amount.

63 Q. Indeterminate?

A. Yes.

Q. Made indiscriminately from all parts of the fat of the animal?

A. Yes sir.

Q. And Helmet lard; now what parts of the—from what parts of the animal is fat extracted to make that product?

A. Well, it is from the—practically back fat and leaf lard. It is cooked in open kettle, not under pressure.

Q. Made from the same constituents that Shield lard is made from?

A. Well, it would practically be the same, but it is mostly from the back fat, the outside fat, and leaf lard. We do that because it is easier to handle. Back fat comes right from the floor in large pieces and can be taken to open kettles without much trouble.

Q. Helmet and Shield brands differ mainly in the manner of producing them?

A. The principal difference is in the manner of cooking it, and as I say, we don't pretend to say it is all leaf or one kind of fat. It is pure fat which will pass government inspection and also Board of Trade inspection in Chicago.

Q. Now, I neglected to get down here what is the net weight of lard contained in the 5-pound gross pail, I didn't get it down when you were testifying?

A. I think it is four pounds, six ounces—four pounds six ounces.

Q. And in the—

VOICE (some witness called later): Four pounds and two ounces.

A. Four pounds and two ounces.

The COURT: That is what you said before.

Mr. ENGERUD: I neglected to get it down.

The COURT: Four pounds and two ounces is what he said before.

WITNESS: Four pounds, two ounces, is right.

Q. And was it given as to the 10-pound gross?

A. I said I thought about nine pounds. I don't remember just what the weights are. I didn't look it up or anything.

The COURT: You said eight pounds and something.

A. Yes, between eight and nine. I think pretty near nine pounds.

Q. Well, you probably could get us—

A. Oh, I can get it exactly, sure, but I don't remember just exactly at this time.

64 Q. I show you Exhibit "B" and ask you if that is the ordinary form of bill or invoice that was used in the trade in your products at the time it bears date—at that period of time, 1910?

A. Well, I don't know. This is a branch house bill. I never see these bills.

Q. Well——

A. It might have been——

Q. Well, with your knowledge of the trade, I ask you, can you interpret that invoice to us?

A. It might have been at that time.

Q. Just——

A. I couldn't positively say, because I don't see branch house bills at all.

Q. Well, as a man versed in this trade, I ask you how you would interpret that bill?

A. Well, I would interpret that bill to mean the small and medium pails.

Q. Take the first charge item appearing on this bill. I will ask you if it doesn't mean one case of twelve 5 pound Shield lard, 60 pounds at 15—16 $\frac{7}{8}$ ¢ a pound, \$10.13?

A. That reads that way, yes sir.

Q. That is the way you would understand it?

A. I would read it that way.

Q. The next item on the same bill would be interpreted to mean: One case containing twenty 3-pound Shield lard pails, it being 60 pounds, at 16 $\frac{7}{8}$ ¢ a pound; total price \$10.13?

A. Yes sir.

Mr. ENGERUD: Offer Exhibit "B" in evidence.

Mr. WATSON: Objected to as incompetent, irrelevant and immaterial, for the reason that the same does not relate in any wise to the transactions referred to in the complaint—in the amended complaint in this prosecution.

Overruled. Exception.

Q. Did I understand you correctly to state that the product called Crisco was a cottonseed oil product?

A. So I understand. I have never seen it made, but I understand it is made from cottonseed oil.

Q. And without animal fats in it?

A. I don't *there* there are any. I have understood not. It is a secret process.

Q. That too, is a product that is put out and intended for use; the same uses as lard can be used for?

A. Pastry shortening, yes sir; I understand so.

Mr. ENGERUD: That is all.

65 Redirect examination by Mr. WATSON:

Q. You say that you are familiar with the marketing of these lard products in all the different packing houses of your company?

A. Yes sir.

Q. You are familiar also with the marketing of these products abroad, are you?

A. Yes sir.

Q. South America and Europe?

A. Yes sir.

Q. Asia?

A. Yes sir.

Q. Are the tin containers touching which you have testified, the standard sizes which are used in that trade of your company, both domestic and foreign?

Mr. ENGERUD: Objected to as irrelevant and immaterial.
Overruled. Exception.

A. Yes sir, we use them at all points.

Q. I will ask you whether anywhere in the world where your lard is sold, it is unlawful or forbidden to you at the present time to put it out and sell it in tin pails, cans and containers which are now in use by your company, unless it be in the state of North Dakota.

Mr. ENGERUD: Objected to as irrelevant and immaterial.
Overruled. Exception.

A. I know of no place where we can't sell the lard in those packages.

Q. Unless it be North Dakota?

A. Well, unless it be here.

Q. Yes, I mean—what I mean to ask you—

A. Yes, I understand.

Q. —whether there is any other jurisdiction, either in the United States or in any foreign country in the world in which you do business where the authorities have said to you, "It is unlawful to market your product in the tins such as you are using at this time and have used for years."

A. Not a place on earth that I know of, except here.

Q. Then if a change were made in your method of handling your lard product, it would have to be alone for the State of North Dakota, would it, Mr. Howe?

A. That is the only place we would have to do it.

Q. I meant also to have inquired of you whether the other large packing houses in the United States market their lard products in tin pails and cans and containers which substantially correspond to those used by Armour and Company?

Mr. ENGERUD: Same Objection.
66 Overruled. Exception.

Q. In sizes?

A. They are all alike.

Q. All alike?

A. Yes sir.

Q. And this is a universal custom, as far as the packers of the United States are concerned, is it?

A. Yes sir, we have to make them alike to compete with each other.

Q. And the net weight of lard or lard substitutes and lard compounds found in these different containers put out by all the different packing establishments is substantially the same, isn't it?

A. Yes, must be the same; couldn't afford to have them vary for the reason we couldn't compete.

Q. But they might vary an ounce or so?

A. Oh, a fraction, but substantially the same. It couldn't be otherwise.

Q. Couldn't be otherwise. What is the method pursued in your packing establishments in the matter of weighing these containers after they are filled with melted lard and while being filled?

Mr. ENGERUD: Objected to as irrelevant and immaterial.
Overruled. Exception.

A. They are weighed over automatic scales set to weight, each of them, and the men stand there and fill them in sets and then they are tested. There are several men that go over each department and test all of our weights at different times. They will go into the refinery at different times of the week and open cases and take out pails and see that they are uniform and full weights.

Q. Do you ever take chances on the weight being up to the requirement because of the size of the can, or do you actually weigh each one?

A. The size of the can is exactly the same, but we weigh all this lard?

Q. You never assume because you have got a can of certain size when filled with lard it will weigh so much?

A. No, I will tell you; one ounce or two ounces of lard in a pail might bust us, when you come to figure the amount that goes out.

Q. So you weigh each one?

A. Yes, and I say we not only do that, but have checkers go over the department and criticise as much for short weight as the other, because if they get careless giving short weight, they certainly will the other.

The COURT: Does it change any in the weight from liquid to the solid?

67 A. In density, yes. The hot lard will take up more space than cold lard will.

The COURT: Will it weigh the same?

A. In density—now you take hot lard and it will fill more space than the same amount of lard at a lower temperature.

The COURT: What I mean—

A. You mean, would it lose weight after they are filled. No, it would not.

The COURT: If you put two pounds and six ounces of liquid into that pail—

A. It is there when you use it.

The COURT: Do you measure liquid or solid?

A. The lard when it goes in is a white, creamy substance and it won't change weight. There is no moisture in that lard—at the outside only $\frac{3}{4}$ of 1%. We would consider that excessive.

Q. Now, these pails, the containers in which the lard is placed, are made of a certain standard size, as you already testified, are they?

A. Yes sir.

Q. And the lard, lard substitutes or compounds in all cases are put into these pails in the liquid form?

A. Yes sir.

Q. At a high degree of temperature?

A. Some higher than others.

Q. Well, high enough so it is liquid?

A. They are in liquid form, yes. The coldest we fill is a sort of creamy substance.

Q. And these pails are made sufficient in size so that they will hold the required weight while it is yet in liquid form?

A. Yes sir, they have to.

Q. When it cools it occupies somewhat less space?

A. Settles down just a little bit. In some cases the hotter it fills the more it will show.

Q. I intended to develop a little bit more on my main examination, but overlooked it. The difference in cost between a lard put up in these pails and lard put up in tierces; you said it was, as I recall, about $2\frac{1}{4}\epsilon$ a pound?

A. I think so. A tierce will cost us in the rough about 30ϵ a cwt. for the lard that it contains, on the lard it contains, and these pails—the pail alone costs us about a cent and a half a pound on the lard contained, aside from crating it, and extra labor handling and the waste of tins. Now, we have a great deal of loss through tins becoming damages, dirty, rusty,—things of that kind, and miscut tins that are not filled.

Q. Now, I want to cite a concrete case so I can see how it works out and figures. Take the ten pound pail—

A. Take the five.

Q. That would be this pail, wouldn't it? Take that ten pound, which you are looking at now. The gross difference in the price of that pail of lard and of a like quantity of lard coming in a tierce would be about 31ϵ , or—

A. No.

Q. 32ϵ ?

A. No, it wouldn't.

Q. You stated about $3\frac{1}{4}\epsilon$.

A. $2\frac{1}{4}\epsilon$. A like quantity of lard in that would be less than $2\frac{1}{4}\epsilon$ as compared with the tierce. I was taking the 5-pound. The smaller the package, the greater the difference.

Q. Suppose we take the 5—

A. It would be about $2\frac{1}{4}\epsilon$ on the 5. I was estimating the 5 because it figures an event cent and a half on the lard in it.

Q. Now, there would be about $2\frac{1}{4}\epsilon$ difference against the lard in the 5-pound pail?

A. In the tierce.

Q. In the tin?

A. Yes.

Q. As compared with the lard in the tierce?

A. Yes.

Q. Now, about how much would that amount to in cents, figured upon the contents of that pail?

A. Contents of that pail, it would be about ten cents difference.

Q. It would be about ten cents? Well, this pail would contain about nine pounds and some—

A. That is four pounds and two ounces.

Q. That would be about ten cents? Now in making—in giving this testimony, I will ask you whether you are figuring on the net content which the retailer is buying, or whether you are figuring upon the gross weight of that pail?

A. I figure that on the actual net—the weight the consumer gets, compared with the actual net weight of the lard in a tierce.

Q. By consumer you mean the retailer to whom you sell?

A. No and yes. It is the retailer to whom we sell.

Q. And the retailer passes it on to the consumer?

A. Yes.

Q. And on that 5-pound pail, the difference in the cost, so far as Armour and Company are concerned, in the matter is about ten cents?

A. Just about ten cents.

Q. Now, how much of that ten cents is represented by the cost of the tin pail?

A. The pail itself—we charge it and it figures in actual cost \$74.30 a thousand.

69 Q. How many?

A. Per thousand.

Q. That would be 7.4¢ apiece?

A. 7.4¢ apiece; a little over—practically $7\frac{1}{2}$ ¢—a little over $7\frac{1}{4}$; 7.43, I think it is.

Q. Then the difference which you would get as a selling proposition between the net weight of lard which goes in that 5 pound pail and a similar quantity of lard in a tierce would be 10¢ less 7.4¢, the actual cost to you of the pail; is that right?

A. Yes.

Q. Then the net amount that you would get in cents for the same quantity of lard put up in that pail over a like quantity of lard put up in the tierce, would be between two and three cents?

A. It would be about $2\frac{1}{2}$ ¢.

Q. Now, are you comparing the same quality of lard in each case; same brand?

A. I am figuring on the same kind of lard put in a tierce and the same kind of lard put in pails; in one case drawn out and put in a tierce and in the other case, the same lard drawn out and put in pails.

Q. So we are talking about the same thing?

— So we are talking about the same thing, exactly.

Q. So this extra two cents and a half or three cents which Armour and Company get for the same quantity of lard in the pail represents additional cost of labor in putting it in the small package, cost

of crates and all other work connected with the marketing and putting of lard in the market?

A. The cost of the crate would probably offset the cost of the tierce. The other $\frac{5}{8}$ ¢ per pound is cost of extra labor of handling and putting up this package, as compared with the tierce.

Q. That is to say, the crate which must be used in packing tins and which is not used in packing tierces would be offset by the cost of the tierce?

A. The tierce, yes sir.

Q. So that you have left between two and three cents to pay for the added labor of putting this lard up in the small container?

A. Yes sir.

Q. Now you are giving these facts and figures, are you, from your knowledge of the subject?

A. Yes, they won't vary a cent. It is absolutely right on the figures of the cost and the labor. If I was making a contract tomorrow, I would give it on a basis of $\frac{5}{8}$ ¢ a pound for extra labor of putting it in packages of that size, as compared with a tierce.

70 Mr. WATSON: That is all.

Recross-examination by Mr. ENGERUD:

Q. About how many—approximately how many—of those 5 pound pails represents the annual product of Armour and Company?

A. I would have to refer to our tin shop department.

Q. Approximately?

A. I wouldn't know, because I am only conversant with one plant where they make up and ship these tins.

Q. I mean the product of your factory. How many filled cans do you put out?

A. In the one size—5 pound?

Q. Yes, in the year what is your product of lard put up in 5-pound pails in a year?

A. That I couldn't tell you.

Q. Approximately? A rough estimate; I just want approximately.

A. I couldn't estimate that without going over the figures. You see, we have got a trade in—

Q. Well, confine it to your branch, Omaha; about how many does the branch you are running—take your Omaha factory; about how many 5-pound pails of lard does it put out in a year?

A. Well, I will tell you. We put up in Omaha, on the average, the year around, I should think, in cases, that is, tins, of, say an average of 600 cases a day, that is, of tins; maybe 700.

Q. That means, 3, 5 and—

A. And the 10.

Q. And 10, and how many in a case?

A. There would be six of one size, twelve of another and twenty of another. The other two sizes would run so many over.

Q. And the cases each contain about the same number of pounds, approximately, of lard?

A. Yes sir.

Q. And is the Omaha branch—how does the Omaha branch compare in the quantity of its product with the other branches of Armour and Company?

A. I couldn't tell you.

Mr. WATSON: Much smaller than Chicago, is it?

A. Oh, it is smaller. But you see the trade in tin lard might be smaller in one territory than another.

Mr. Engerud being called away to attend the Supreme Court, Mr. Fowler took charge of the State's case.

71 Redirect examination by Mr. WATSON:

Q. Mr. Howe, I think you did not make entirely clear that difference of—the difference in cost between lard of a given brand put up in 5-pound gross weight pails and the same brand put up in a tierce, as affected by the cost of the tin pail itself, the cost of labor, and offset on the other hand with the cost of the tierce. Won't you just repeat that now; what those figures are?

A. Well, the total cost in the pail is $2\frac{1}{4}\text{¢}$ per pound; that is, the pails cost \$74.30, that is 7.43¢ apiece.

Q. That would be 4.7 cost as the cost to Armour and Company of that pail, would it?

A. No, 7.43¢.

Q. Beg pardon?

A. Practically $7\frac{1}{2}\text{¢}$.

Q. $7\frac{1}{2}\text{¢}$ cost, a pail.

A. That pail holds four pounds and two ounces—four pounds and six ounces—two ounces. That would mean on the contents of that pail a little over a cent and a half a pound, to be figured, as it would figure about 1.60¢ per pound on the contents. Then extra cost of that labor, as I say, I would contract to fill on a basis of about $\frac{3}{8}\text{¢}$ per pound, so that that figures out an extra cost of $2\frac{1}{4}\text{¢}$ that is charged for the lard in the pail.

Q. Now, if you took out this extra cost of labor of putting it into the small pails, handling the small pails, putting the small pails into—

A. Crates.

Q. —crates, and all; after you had deducted that cost and also deduct the cost of the pail; how much per pound would be left to the packer? That is what I am getting at.

A. We figure that the advertisement is all we have got left. We figure the advertising—

Q. I know, now, but wait a minute before you get at advertising. I am now figuring the cost of the pail, the cost of labor, of putting in the small pails, the cost of putting the pails into the crates, and all those incidental matters which represent money paid out in getting this lard ready for the market. How much, after all those things have been deducted, would be left in the way of greater charge per pound for the lard in the pail than the charge for the same lard in a tierce?

A. There is nothing left. You just take those figures I gave you.
 Q. I get $\frac{1}{8}\epsilon$ over.

72 A. There isn't $\frac{1}{8}\epsilon$. You see this pail doesn't hold five full pounds. It costs $7\frac{1}{2}\epsilon$. That would make it cost about 1.62ϵ a pound. Besides that, I say extra cost of labor over tierces is $\frac{5}{8}\epsilon$. Add those two together and you will find it makes $2\frac{1}{4}\epsilon$, which I say is the extra charge we make for the pail.

Q. And $2\frac{1}{4}\epsilon$ is the difference?

A. Is the actual difference. The only benefit we get for putting up in the pail is the lasting advertisement, and the people call for our stuff, is the reason we do it.

Q. You say advertisement. What do you mean, newspaper advertising?

A. No, there is advertising right on that label.

Q. Then do you mean to tell the Court that there is no extra profit to the packer in the larger price which he gets per pound for a given brand of lard put up in the pail over the same brand put up in a tierce?

A. We start out on pure lard all on the same basis; that is, on a tierce basis, and we figure all these cans down to that tierce basis and sell that way.

Q. That is to say, you fix the price of the same quantity put up in these tin pails, on the price of the tierce lard, plus the added cost of getting it into the tin pail?

A. Exactly, the extra cost of the tin pail manufacture, labor, and the crate, if any, but as I said before, the crate offsets the tierce, but it is just the extra cost that is incurred that is added to the price.

Q. Then the only added profit which the packer gets out of this method of handling his product is bringing it before the public in such a favorable way he hopes to build up his trade and establishes it?

A. That is what we are doing it for.

Q. And there is no money profit over a pail of the same lard in the tierces except the advertising?

A. I can make that very—

Q. Is that true?

A. The lard in the pail nets us no more than if we sold it in a tierce.

Recross-examination by Mr. FOWLER:

Q. When did Armour and Company commence placing these net weight stickers on the back of the pails?

73 A. Well, we commenced putting it on when the law required it in different states. I think—I don't remember when it was started in the State of North Dakota; I think about six or seven years ago. I remember seeing Mr. Ladd. He came down to talk to us about it one time and we told him we were ready to obey the law as far as net weight stickers were concerned at that time. We followed it in different states where the law was passed; never tried to evade.

Q. Then, as I understand your testimony, the occasion for placing

net weight stickers upon the pail was to comply with the laws of the various states and the time at which it would be first placed on would be when you first complied with the law of some state?

A. I think so. I don't know of any other time it was put on.

Mr. FOWLER: That is all.

Mr. WATSON: That is all.

J. W. NICHOLS, called as a witness for the defendant, being first duly sworn, testified as follows.

Direct examination by Mr. WATSON:

Q. Where do you live, Mr. Nichols?

A. Chicago.

Q. What is your age?

A. Fifty-two.

Q. And what line of work are you engaged in at the present time?

A. Tin shop.

Q. What?

A. Making lard pails and meat cans.

Q. For whom?

A. Armour and Company.

Q. What is your title in that business?

A. Superintendent of the tin shop.

Q. Superintendent of the tin shop. Armour and Company have a packing house at Chicago?

A. Yes sir.

Q. They put up lard there, do they?

A. Yes sir.

Q. Among other products?

A. Yes sir.

Q. Do they make their own pails or do they buy them ready-made?

A. They make them.

Q. In what form do they buy the tin from which they are made—in sheets?

A. In sheets and boxes.

Mr. FOWLER: Pardon me, Mr. Watson, it is understood that this evidence goes in under the general objection.

The COURT: It is so understood.

Q. Now, you are superintendent of the tin shop, you say?

A. Yes sir.

Q. How long have you been with Armour and Company?

A. Thirty years.

Q. In what capacity?

A. In the tin shop.

Q. All the time in the tin shop?

A. All the time in the tin shop.

- 74 Q. You are general superintendent of the tin shop?
A. At the present time.
Q. How large a shop is it?
A. Well, we employ 340 to 400 people.
Q. All the time?
A. Usually, except in the fall or in the spring, they sometimes run down to a little less than 300.
Q. Is all that force of men working all the time in the making up of tin pails for the products of the packing house?
A. Tin pails and meat cans.
Q. Tin pails and meat cans?
A. Yes sir.
Q. You ship a good deal of your dressed meat in cans, do you?
A. We can meat.
Q. Yes, well like the pressed ham and—
A. Potted ham—corned beef.
Q. Yes. There are, I believe, six of these establishments of Armour and Company, are there—six packing houses mentioned by Mr. Howe?
A. Well—
Q. Well, I only want to ask you how many of them that have tin shops such as you run there in Chicago?
A. Why, Kansas City and Chicago.
Q. Kansas City and Chicago?
A. Yes.
Q. Now, the other four do not have such shops as you have?
A. No.
Q. You buy this material in the form of sheets, do you?
A. Sheets and boxes.
Q. Buy directly from the tin plate mills?
A. Yes sir.
Q. In carloads?
A. Yes sir.
Q. Do you specify in advance the size of these sheets?
A. Yes sir.
Q. How do you determine the size of the sheets you will buy?
A. By what we want to use it for.
Q. By the size of the can you are going to make?
A. Yes sir.
Q. Those sheets are purchased of a size which will involve the least possible waste in the making up of the cans?
A. Yes sir.
Q. Are the sheets from which the tin pails and cans used in putting up your lards and lard compounds are made purchased of a proper size and to make these special sizes of cans with the least possible waste of tin?
A. Yes sir, that is the way we order them?
Q. The way you order them?
A. Yes sir.
Q. These sheets, then, are turned out at the mills in that form, are they?

A. Yes sir, whatever size is specified.

Q. Sir?

A. Whatever size is specified in the order.

75 Q. Whatever size you specify. Now, as a rule do you get a different sized sheet—for instance, for the five-pound can from the one which you would use for the twenty-pound can?

A. Yes sir, different.

Q. It would be a different sheet altogether?

A. Yes sir.

Q. This five-pound can, as far as the size of it is concerned, are made out of one sheet, are they?

A. Yes sir, four out of the sheet.

Q. The size is—four of those cans made of the one sheet?

A. Yes sir.

Q. The sheet is of such size you will exactly get four without any loss of tin?

A. Without any loss of tin.

Q. Without any loss of tin, and the tin which goes into that can is made up from certain sheets?

A. Yes sir.

Q. And the tin for that can is ordered from the tin plate mills of such a size that it will make up into those cans with the least possible waste of tin over?

A. Yes sir.

Q. And can you make those cans any larger from the size sheets which you are now buying for those purposes?

A. We couldn't make them 1-16 larger.

Q. Couldn't make them 1-16 inch larger any way?

A. No sir.

Q. Now, in the next place I notice that all of these cans have a label upon them. Tell the Court how that label is made; what kind of label is it? How is it put there?

A. That is a lithograph label, put on by the process of lithographing; what we call dry lithographing. The usual form of lithographing is wet.

Q. Who makes the plate from which that work is done?

A. Globe Engraving Company.

Q. Where are they located?

A. Dearborn St., Chicago.

Q. What are these lithographs made of?

A. Why, they are electro-type plates made of compound—compound filled up with electrotpe material.

Q. Now you have a stock of those on hand, have you, at Chicago?

A. We have enough to do our present work, yes sir.

Q. Is it necessary that you have these plates in different sizes for all these different cans for all the different plants, and that you have at least three of them for each different plant on account of the different sized cans?

A. We have a plate for every sized can and every brand.

Q. For instance the plate which you use upon this small 3-pound

can is altogether different from the plate which is used on the new one?

76 A. Yes, entirely different.

Q. And then you are putting out Shield in a still large package, the ten-pound can,—or is that twenty-pound?

A. That is a ten-pound.

Q. —10 pound-can, and you must still have a larger—

A. Yes sir, every—

Q. form from which to print it?

A. Every sized pail has its own label.

Q. Every sized pail has its own label?

A. And own plate to make it with.

Q. Now, you say that is a compound plate, and you have to have those in duplicate, or triplicate, do you, or how many do you have?

A. No, they usually last a long while.

Q. No, but I mean this; when you start to print that name upon a sheet of tin, if a sheet of tin will make four of those cans, you have got to have at least four of those plates, haven't you, to print four at a time; in other words, — have to have one for each one?

A. That label, Shield brand, has two whites, one yellow, blue and lacquer, finished in one operation.

Q. But, then, you don't grasp my point. You are going to put those labels upon a plain sheet of tin before the tin has been formed for use as a pail. don't you?

A. Yes sir.

Q. Now, you must print that form four times on the same sheet, musn't you?

A. No. There is four operations with—before it is discharged from the machine.

Q. That is to say—

A. I can explain it. First the machine catches the tin and puts on one color; revolves, puts on another color, and so on till it gets the five colors on it. Then it discharges it. After the fifth operation the fourth sheet is in the machine; one going in and one going out—

Q. But what I want to get at—you don't grasp my question—is, you have got to have that label appear at four different places on the same sheet of tin?

A. Five on that; four on the other.

Q. Oh, yes, five on that; four on the other. Then you must have five of those plates for use at the same time?

A. Yes, five labels on one plate.

Q. That is what I mean.

A. But the label is spaced so that you can cut out the body without any waste in between.

Q. Well, now, the first thing you do when you are getting ready to make up a lot of these plates for use in the manufacture of
77 tins is to run them through this machine and put that label on, isn't it?

A. Yes sir.

Q. That is done the first thing. Now, what is the next process in making a tin can?

A. Well, we cut out—cut the body out with a die—or all parts. Then we assemble it. If we have—we ship to St. Louis; we ship it in the flat or cut plates where they have no machines to cut out.

Q. Your plant and the Omaha plant together do all of this work of putting the labels on the sheets, do you?

A. Chicago and Kansas City. Omaha has no tin shop.

Q. I mean Kansas City; Chicago and Kansas City do all that work, and from *from* those two plants these sheets which have been supplied with the label are then sent on to the other plants to be put up in the form of cans, are they?

A. After they are cut out.

Q. After they are cut out. Well, do you cut out the Lid?

A. Cut out everything.

Q. And the bottoms?

A. Everything.

Q. And the wire handle?

A. Everything.

Q. And the ears?

A. Yes sir.

Q. And they are all sent on in quantities to these other plants; then those other plants have assembling machines, have they?

A. Yes sir.

Q. Are these cans all put together by use of machinery?

A. Yes sir.

Q. Bottoms put in by machinery?

A. Yes sir.

Q. And the sides are fastened together by machinery?

A. Yes sir.

Q. All that is done by machinery?

A. Yes sir.

Q. But you—your plant and the Kansas City are the only ones that cut up the sheets that form the tops and the bottoms and cut it up, put the label on, are they?

A. Yes sir.

Q. You are the only two that do that?

A. Yes sir.

Q. The sheets are sent out to all these others and they have forming machines and put them together in the form of cans?

A. We call them assembling machines

Q. Well, assembling machines?

A. Yes.

Q. Are you familiar with the cost of doing this work?

A. Well, I am—I leave that to our office force.

Q. Well, you could figure out the cost of any of them?

A. Yes sir.

78 Q. You heard the testimony of Mr. Howe in relation to the cost of the tin that went into a ten-pound, or was it five-pound—into a five pound pail?

A. That is about right, \$74.40, I believe, or something like that, we charge the lard department for them.

Q. That is substantially the cost of the tin?

A. Of the pail.

Q. That is the cost of the material and cost of making?

A. Our department is called the expense department.

Q. That made about 4.73¢ the actual cost of a five-pound pail, didn't it?

Mr. STRATTON: 7.4.

Q. 7.4—I got that wrong. That is correct, is it?

A. 7.4, 7½.

Q. For the cost of a ten-pound pail—five pound pail?

A. Five pound pail.

Q. That includes both the covers, does it?

A. Yes sir.

Q. Is everything that goes out from your establishment sent out with the summer cover?

A. Yes, we get out an equal amount of summer covers as we do bodies or covers.

Q. So that every can that goes out of your establishment has these two covers?

A. Has an equal amount of both. We sent out bodies, covers, bottoms and summer tops, all equal, so that when they assemble they have none left—and bails, ears.

Q. Were the summer covers sent up with these cans which are here in the court room?

A. I don't know. These cans was shipped from the lard refinery; wasn't shipped from our shop.

Q. Well, those summer covers can't be put on by hand, can they?

A. No. They can be put on by hand, but you couldn't put the other cover on.

Q. Well, now, just show to the Court why—what has happened to this can in the putting on of that summer cover, as it is called?

A. This summer cover is the same diameter as this cover before it is run through what we call the crimping machine—summer top crimper and is drawn in tight enough to allow this cover just to go over. It is held out with a chuck here and drawn in.

Q. This is the form of the tin before it has been filled with lard and before the crimping machine has taken hold of it, isn't it?

79 A. Yes, that is the form. The summer cover fits right over. You run it through the summer top crimper and then this just fits on.

Q. Do you carry considerable stocks of tin sheets at Chicago from time to time with which to make up these pails and cans?

A. A stock of every size—a large stock.

Q. Now, going back just a moment. You told us that the sides of these cans are made of sheets which are ordered, especially for use with a view to the incurring of the lowest possible waste in the making of the given sized can?

A. Yes sir.

Q. What is the fact as to the sheets which you order for the making of the bottoms of these tins?

A. Order the same way, to have the least waste possible.

Q. That is to say, for the making of the bottom of these tin pails you order a sheet of such a size that in making bottoms from it for that can there will be the least possible waste of tin?

A. Not a sixteenth between each cut of tin.

Q. Now, will you use the same size sheets for the making of that top?

A. No sir.

Q. Will you order a special sheet for the making of that top?

A. Yes sir.

Q. Will you use the same size sheet of tin for the making of the summer cover that you will for this outside cover?

A. No.

Q. It is a different sheet altogether?

A. Different sheet entirely.

Q. Different sizes?

A. Different, certainly.

Q. And the waste from cutting will be less if you get the proper size of sheet?

A. Yes sir.

Q. Now, is what you have testified to in regard to the making up of that small can equally true of the making up of each other sized can upon that exhibit?

A. Yes sir.

Q. The sheets, in other words, must be especially ordered for the sides, for the outer cover, for the summer cover, and for the bottom; each one is a separate sized sheet?

A. Every part of the can is separate.

80 Q. Every part is separate. How many different sizes of tin sheets would you have to have in your factory in order to economically make up at the least cost the cans which are exhibited upon this table?

A. Have to have four different sizes for each size?

Q. How many would that be, all told?

A. There are three sizes of the four—twelve sizes for the Simon Pure alone.

Q. Twelve? Go ahead.

A. Shield would be the same—or would be twenty sizes for the Shield. There are five sizes of the Shield.

Q. Twenty-five, for the next one?

Mr. STRATTON: Twenty.

A. The White Cloud would have—two—well, White Cloud would have—eight—about forty sizes of tin.

Q. You would have to have about forty different sized—

A. They have forty sizes.

Q. —sheets of tin in order to make up these containers which are exhibited. Now, you must keep a stock of each one of those different sizes on hand, must you, in your place?

A. Yes sir.

Q. How long in advance, as a rule, do you have to order tin sheets before you get them from the mill?

A. Sixty or ninety days.

Q. Are these kept in stock so you can go and buy off hand.

A. No, our size of tin is never carried in stock.

Q. Never carried in stock?

A. The mill don't carry no stock only what they call odds and ends—a few boxes. We order a thousand boxes of one size, and we don't want to take it and they have a hundred boxes left over; that is all they carry.

Q. Then in order to get these sheets you must order sixty or ninety days ahead and must specify the sizes required?

A. Yes sir.

Q. And there wouldn't be any stock in the United States kept of those sheets of these required sizes?

A. No sir.

Q. They have to be made by the tin plate mills?

A. Yes sir.

Q. And it takes you sixty to ninety days after you order them before you can get them?

A. Yes sir.

Q. Now, does the plant at Kansas City also have to carry the same kind of a stock and make the same sort of provision ahead of time for their tin plates?

A. Yes sir.

Q. Same as you do?

A. Yes sir.

Q. Do you know how many men they employ in their tin shop at Kansas City?

81 A. No, I do not.

Q. Do you have in your tin shop at Chicago the latest and most approved machinery?

A. That is our aim.

Q. For doing all of this tin work?

A. Yes sir, that is our aim, to get the most improved.

Q. You have this machinery with all the latest appliances, labor saving devices and all things of that sort, do you?

A. Yes sir.

Q. Good deal of skilled labor involved in that shop?

A. Yes sir.

Q. Is it mostly skilled labor or is it common labor that does this work?

A. Oh, about an equal amount.

Q. About an equal amount of each?

The COURT: What are those bulges in the large cans there for?

A. You mean in the large cans?

The COURT: Yes.

A. Why, we use it as a strengthener; that to make the can more rigid. It is a corrugation that we use. If we didn't have

that there it would dinge in a great deal easier. It is like bracing it.

Q. It adds stiffness to the can, does it?

A. Yes sir.

Q. Then I might call your attention to the finish on the inside of this?

A. That is what we call false wire edge. We do that to stiffen it. If we didn't have this wire edge, what we call beaded, it would go together when you go to lift up the contents of the pail and made it wider—spread out—these two points would come together; you couldn't get the cover on. That acts as a stiffener and this acts as a stiffener as well as to hold the cover. The covers rest on here. That is what that is put on there for.

Q. Now, just tell the Court briefly the different machines which are required in order to manufacture one of these tin pails from a sheet of tin, giving us the different things that are done in the process and a general description of the machinery that does it?

A. Well, in the first place we have to have a lithograph press to do the lithographing and lacquering of the bodies, and we have a coating machine. Now, each one of those machines has to have an oven. After it is lithographed, and the lacquer—that is, the front of the lard can there, the label is put on, and lacquer around that label, and it has to go into an oven with 218° to 230° heat; stays
82 in four or five hours—

Q. By the lacquer you mean everything on the pail, outside of the label?

A. Everything on the pail outside of the label. The lacquer is this—the bronze color.

Q. I will ask you if the outside of that pail looked just like the inside before you put on this lacquer?

A. Yes sir.

Q. Go ahead.

A. Then it stays in there—well sometimes it takes six hours, according to the atmosphere. If there is lots of moisture in the atmosphere it requires a little more heat; that is, more time. Humidity in the air it won't dry as quick. We got to get that thoroughly dry, because we carry a very large stock of lithographed stock, because it takes so long to change machines and it is used so fast we have to carry a big stock. We have one machine to do all the labels. The five-pound there we carry possibly 2,000 boxes. Each one of those boxes has seven or eight thousand a box—some a little bit more, according to the size of the tin, and we stick that up there and then after we get the fronts of the pail we lacquer the back of the big pail through a coating machine. That coats just the same as the label is done. It runs over two composition rolls and puts lacquer on one side and keeps the other clean. We have to bake that. After we get the lithographing done, it goes to the lower floor and gets cut out by what we call a punch press. Of course the punch press is gauged in size according to the work; the larger the work, the bigger press it would require; and each part of the can has to have a die, and it is in duplicates, most of them, and we cut them out and then they are taken up on the second floor. The first operation after they are all

cut out is to fold the body in this shape, interlocking—what we call locking,—and then run it over the bumping horn and hit it with a hammer. That is the same operation as a press but we call it a hammer. It hits a blow and clinches it together so tight it is almost hermetically sealed. Then we put on the bottom.

Q. Could you illustrate better as you go along with one of those cans in your hand?

A. Now, this here—this body is formed, interlocked, then it is cylindrical. You put the body over the horn in this shape, a hammer comes down, hits it and drives it tight. Then the end is put on, a boy puts the end on and then runs it through what we call
83 a double seamer, throws this end over, ties those four thicknesses of tin through there. Then it goes to this beader and fits in there just so that what we call the inner tube fits in and then a nut comes down and rotates very fast with power enough to jump over this seam and forms that bead.

Q. What is the purpose of that bead?

A. That is stiffening and to hold the cover so it won't rest on the top. Then it is run through the wire edging machine. Set down and a chuck revolves in this case very fast. There are three rolls standing like that. It revolves or rolls with a half circle in just the size you want to make the roll. You can make that finer or larger as you make it rotate. It comes down, or the pail rather goes up to this head and rotating very fast makes this wire edge. Well, then, after that we run it through what we call an ear machine; very complicated fast machine that punches—you put it on a stand, punches a hole in one operation, goes down, ear drops in, clinches in one operation. A girl comes along, puts the bail in and the pail is finished.

Q. Now tell us about covers?

A. The covers is cut out—the die—this here would take what we call a 45. The die is set in there and every time the operator puts his foot down the blank comes down and it cuts it out. So on with all of the tin.

Q. And summer covers?

A. Summer covers; all parts of them; even the ears is done in the same way; inner and outer part of the ear; every operation. Every time the operator puts his foot down a die comes down and cuts one of those out.

Q. This machinery which performs all these offices that you referred to is expensive in its character, is it?

A. Yes, they are all patented machines. Most every machine we have got carried a patent of some kind or another.

Q. Pay royalties on some?

A. No sir, we don't aim to pay royalties, but we have got to pay their prices.

Q. You have to pay their prices. Now, we will suppose, Mr. Nichols, that Armour and Company were going to put out lard products in tin pails which would be increased in size sufficiently so that the small pail would hold three pounds, net, of lard, and so that the next size would hold five pounds net of lard and the next size ten pounds net of lard, and so on; in other words, so that the net content

84 of each of these packages would be the same as the gross weight of each of them is now when it is filled with lard. I want to ask you what that would mean in the matter of the tin side of the proposition. In the first place, tell us about the sheets of tin you would have to buy for making those larger cans?

A. Well, we would have to have larger sized tins for every size before mentioned.

Q. Would that include also the tops and bottoms, and sides?

A. And dies to cut them out and would have to have new electro-types made.

Q. Well, what I mean is this: Suppose that this present can right here holds three pounds and six ounces; is that what it is?

Mr. FOWLER: Two pounds.

Q. Suppose that can holds now a net weight of two pounds and six ounces, and assume that the can is in its present form just as small as it could be made in order to receive that quantity of liquid lard. Suppose that you are going now to make the can which would hold three pounds net of lard in its liquid form so that when you put that upon the market it would be, not three pounds gross, but three pounds net of lard; that would mean a larger pail, wouldn't it?

A. Certainly.

Q. Well, now would the sheets of tin which you order for the making of Plaintiff's Exhibit A answer for the making of this larger sized tin to receive three pounds net of lard?

A. No sir.

Q. You would have to have different sheets for that?

A. Yes sir.

Q. Would the sheets out of which that outside lid is made answer for the making of the lid on the larger can?

A. No sir.

Q. Would the sheets you now use for the making of the summer lid answer for the summer lid of the new can?

A. No sir.

Q. Would the sheet which you now use for the bottom of this present can answer for the making of the bottom of the larger can?

A. No sir.

Q. Would that larger can be increased proportionately, both in height and also in diameter?

A. Yes sir.

Q. So that you would require different sheets all around?

A. Yes sir.

Q. Both for top, sides and bottom?

A. Yes sir.

Q. That would be true, would it?

A. Yes sir.

Q. Then passing on next to the placing of that label on the can, which is slightly larger than this one, could you use the same plates which you are now doing?

A. No.

Q. Why not?

A. Because this label has got to be a certain distance from

the bottom. If we had a die to cut them out, this next label is 1/16th, the next one would be 1/8, the next one would be 5/8 so that we wouldn't have any label at all, only part of the label on the last cut.

Q. You mean there being five of those labels on one of the press forms that you get——

A. Yes sir.

Q. —when they would be printed upon the larger sheet——

A. Yes sir.

Q. —and that larger sheet would be cut up for use in the making of five cans, it would bring the label as printed from the press form at different places upon the can?

A. Yes sir.

Q. On some of the cans it would be the same as here, would it?

A. On the first cut; if it was the last, probably, of the sheet, we could make the first cut that far from the bottom. The next cut would be in proportion. If you raise this 1/8 inches, the next would be 1/8 inch lower at the bottom, the next 1/2 inch, the next 3/4.

Q. It would be an inch and a quarter out?

A. Inch and a quarter would be about it.

Q. Well, then, do you say, as superintendent of that department, familiar with the work of it, that if you attempted to turn out those larger pails it would be necessary to have new plates made in order to put your label upon those larger cans; would that be true?

A. Certainly. We couldn't do it otherwise.

Q. Couldn't you use plates from some other cans here; that label there?

A. No, it is out of the question. You couldn't do it.

Q. That is what I wanted to know?

A. Yes.

Q. Then it would be true, if you complied with this law of North Dakota, and made the larger tins, you would have to start in as an initial expense in having new plates made from which to print labels, would you?

A. Yes sir.

Q. Now, is what you have testified to in regard to this small pail—necessity of buying or procuring extra plates for printing the label—not true of each one of all those cans that are on the table?

A. Yes sir. Every label.

Q. And is what you have testified to in regard to the necessity of specifying and buying and having made at the tin mills different size sheets for sides and bottoms and tops of small cans likewise

86 true of every sized can on that table?

A. Yes sir.

Q. So if you complied with that law, you would have to have all those new dies, plates and also have to have in stock and order from the tin mills sheets of different sizes to make all those different cans, would you?

A. Yes sir.

Q. Differing from anything you have got in your business now?

A. Yes sir.

Q. Or from what you are required to have there under your present method of conducting your business?

A. Yes sir.

Q. That is true, is it?

A. Yes.

Q. Do you figure that in the turning out of these sheets and forming of them, the cutting of them and the making of the lids and the bottoms and the summer lids, that you would have to have new machinery altogether, or could you regulate that by the use of different dies?

A. Well, we wouldn't have to have no new machinery—practically no new. We would have to have parts, such as dies and chucks, wire edge chucks and double seaming chucks, and bumping horns, because every part of this pail is made to fit exact. If you make it smaller or larger, you would have to have new ones.

Q. Would the same changes have to be made down at the Kansas City plant?

A. If they wanted to make the pail they would have to.

Q. Now, I want to know about—a little more particularly about this—on this subject. Let's go—let's consider first the question of the plates which you have to buy; the extra plates which you would have to buy for the Chicago plant and the Kansas City plant for the purpose of printing these labels upon the cans. Have you figured up how much it would cost you to equip those two plants with the necessary plates with which to get this label upon these larger cans?

A. I haven't figured the exact cost.

Q. Perhaps you can tell by inspecting these tables which were made up under your direction, or by yourself, what that added cost would be?

A. These are correct. These are figures taken from the prices of our present plates.

Q. And how much do you make it?

A. Well, \$1,976.73.

Q. For one plant?

A. For one plant.

Q. And it would be doubled, because you would have to install the same thing in the Kansas City plant, would you?

A. Yes sir.

87 Q. All right. What else have you figured on?

A. Well, the dies.

Q. The dies? Now, what are the dies? Just explain to the Court.

A. The dies is made from tool steel, highly tempered. They cut the different parts of a pail—cut and form. You have a cover die. That would be to make a cover; couldn't be used for anything else, only a cover and what you made it for.

Q. And if you made these sides and tops and bottoms up into sizes different than you are now using, you would have to have extra sets of these dies in order to do it, would you?

A. Yes sir.

Q. Well, then, would you also have to have these dies for both the bodies, the covers, the bottoms, the summer tops, and for the doubles,

the bumping, the beading, and the false; would you require the dies for all of those parts of the pail?

A. Well, the dies, the bumping hors, and beading rolls, and false wire edger is a tool. Well, dies, of course, is a tool in one sense of the word, but these ain't so highly tempered as the dies are.

Q. Well, if you are going to make these larger pails, you would have to have extra dies for all purposes?

A. Yes, all these as shown in here.

Q. And the dies as you have now for the manufacture of this standard tin, or standard pails, wouldn't answer for the larger size?

A. Wouldn't answer at all.

Q. Well, have you figured how much it would cost to equip one of your plants with extra dies?

A. \$1,846.

Q. That would have to be repeated for the Kansas City Plant, would it?

A. Yes sir.

Q. Now, what is the fact, Mr. Nichols, in the operation of these machines for putting together these cans and doing this work, of the liability to accident in the breaking of a die?

A. Well, usually if we have—I always carry duplicates.

Q. Well, I ask you whether it is a manufacturing necessity?

A. I have known dies to last two hours and some to last five years. There is no way of figuring how long a die will last.

Q. From your practical experience, what do you do in respect to—

A. I have a duplicate always.

Q. Well, would it be essential and necessary if you are going to carry on a business, to have these additional dies in duplicate?

A. Yes sir.

88 Q. You consider it would be?

A. Yes, if you are manufacturing any amount.

Q. How long does it take to make a die in case one of them should break?

A. Three weeks. From three weeks to longer, because lots of times—we figure three weeks. Sometimes it is longer on account when they get it finished and the last part is the temper, why it is liable to go bad. The forging may be wrong or a flaw may develop in the tempering process. We are never sure of a die until we have it in operation and have operated it an hour before we know whether we have a die or not. Always figure three weeks.

Q. If you tried to operate a plant without duplicate dies and one size broke, it would be three weeks before you could make any more cans that size?

A. Yes sir.

Q. Then these items you have already given would have to be doubled in order to have duplicate dies?

A. That is if you want to manufacture cans, yes.

Q. And that would be doubled at each of these plants?

A. Yes sir.

Q. Is it not customary in other factories the same as yours to keep a set of duplicate dies?

A. Some has four or five duplicates, according to the amount of work they are turning out.

Q. One duplicate would be the minimum it would be possible to do business with safely?

A. Yes.

Q. I mean original and duplicate?

A. No plant would be safe with one set of dies.

Q. That is, you wouldn't consider it safe to run an establishment with less than two dies of each kind?

A. No, no.

Q. What about the double seaming chucks and bumping horn and beading rolls and false wire edge appliances which are used in the making up of the pail?

A. Well, that is essential too. Every size is made to fit one size and you change the size 1/32 of an inch you would have to get another. If you make a smaller pail you got to get it cut down or you couldn't use it, or you make a bigger pail you have to make a new one.

Q. Well, you would have to make them all new, wouldn't you?

A. Yes sir.

Q. And how much would the cost of that be?

A. Well, it is all figured together there.

Q. Well, now these last items that I have inquired about are parts of the assembling machinery, aren't they?

A. Yes.

89 Q. And the Omaha and East St. Louis plants would have to be equipped with those additional appliances, would they?

A. Yes sir.

Q. Besides Kansas City and Chicago; is that true?

A. Yes sir.

Q. Have you figured the cost of those items?

A. Well, the total cost is \$6,542.

Q. Then the item—well, that referred to the dies and the appliances used at Chicago and duplicated at Kansas City, didn't it?

A. Yes.

Q. Now the cost of the seaming chucks, bumping horn, beading rolls, false wire edge appliance, would amount to how much for the different places where the assembling is done?

A. \$421 each.

Q. And for the two plants it would be \$842, would it?

A. Yes sir.

Q. And then add all what you would have to supply to the plants at St. Louis and at Omaha and what would the total be?

A. \$11,337.46.

Q. \$11,337.46. Now what would you say would be true as to this larger pail that you have been describing, in case it were manufactured, to the company, costing more than the present standard size of pails commonly used by the company?

A. Well, approximately, the small size would cost about \$1.50 a thousand; medium, \$2.25, and the large, \$4.50; the buckets about \$8.00, and the cans, \$10.00.

Q. Now, are those prices less or more than the price of the standard pails of slightly smaller size?

A. More.

Q. These items you have given are simply the cost of the tin, or is that the cost of the pail, or tin?

A. That much more of the material required.

Q. The material would cost that much more than the material in smaller pails?

A. Yes sir.

Q. Of standard size?

A. Yes sir.

Q. Is that what you mean?

A. Yes sir.

Q. Would it be necessary for the company to carry a larger size stock of tin sheets on hand than it does under its present method of doing business?

A. Yes sir, to manufacture cans you would have to have tin to manufacture them.

Q. And have to have the sheets of all these special sizes?

A. Yes sir.

Q. Now, when you come to pack up these tins in crates, how would the crates that are now used serve the purpose?

A. Crates?

Q. Yes, the crates, the different crates?

A. We don't pack them up in crates.

90 Q. They wouldn't answer the purpose?

A. We don't pack none in crates.

Q. You couldn't use crates?

A. We don't use crates.

Q. I mean after the tins are shipped?

A. I don't suppose they could be used. All crates is made to fit the can. If the can is larger it would require a larger crate.

Q. Then the crates which are made up as has already been described by Mr. Howe, of certain sizes of lumber, which are made up so many inches long or so many feet long, and so as to contain a given number of each size of can, wouldn't be suitable for shipping these cans in, would they?

A. I wouldn't imagine they would. Still, that is the refinery. They are filled before they are put into crates, and I am in the tin shop.

Q. I understand that, but each of these tin pails would be slightly larger than the present size, wouldn't they?

A. Certainly much larger. They would be a different shape.

Q. What?

A. They wouldn't be our regular shape.

Q. They wouldn't be the standard shape, would they?

A. No.

Q. Then a certain given number of them wouldn't fit into the crates that are now in use, would they?

A. Certainly not.

Q. Then, wouldn't special crates have to be made; that is what I am getting at?

A. Oh, yes, sure.

Q. Well, would that be true of crates of the different sizes, for all the different sizes of these tins?

A. They would all be larger and the crates would have to be larger.

Q. What I mean is this: That you would have to increase the size of crate which was intended to receive twenty of that size can, wouldn't you?

A. Why, yes.

Q. The crate would have to be made larger in the first instance?

A. Certainly.

Q. And likewise the crate which would receive that can there would have to be made larger, wouldn't it?

A. Certainly.

Q. That is, I mean the can that would be a little bit larger than this one?

A. Yes sir.

Q. As made by your company would require also the making of a larger crate?

A. Yes sir.

Q. And that same thing would be true of each of all these different size- of cans, wouldn't it?

A. Yes sir.

91 Q. Well, now, you ship these pails after they are lithographed there in the Chicago house, or after they have the label placed on them in the Kansas City house, to these other houses, as you have already mentioned?

A. Yes sir.

Q. Assuming that you made the larger sized pail so as to comply with the North Dakota statute, you would likewise have to ship to each of the packing houses of your company whose products would come into North Dakota, a supply of all of these sheets intended for the larger pail, would you?

A. Yes sir.

Q. That is to say, for instance, Sioux City or Omaha, or St. Louis ship lard not only into North Dakota, but ship into many other states also, don't they?

A. We never ship to — from Sioux City.

Q. No, but Sioux City may ship to North Dakota?

A. Well, they would have to be assembled in some other—either Kansas City or Omaha.

Q. They have no assembling—

A. No, they have no assembling department at Sioux City.

Q. Well, let us take Omaha then. We will assume that Omaha jobbers ship, or that the Omaha plant ships some of its products here in North Dakota. Now Omaha would have to be supplied with the tin made up for these pails of the larger sizes, intended for the North Dakota trade, wouldn't they?

A. Yes, through Kansas City tin shop.

Q. Then Omaha would have on hand tin that was intended to be made up into pails of the present standard sizes and it would also have to have on hand continuously a supply of tin for these slightly larger pails to be used in the North Dakota trade, would it?

A. Yes sir.

Q. And the same thing would be true of all the plants of your company, some of whose products might be shipped into North Dakota.

A. Yes sir.

Q. That is true, is it?

A. Yes sir.

Q. And that necessitates, therefore, the carrying of the larger stocks of tin made up into these forms and with the label of Armour and Company printed upon them at a large number of these plants?

A. Yes sir.

Q. Make a larger investment of capital in these containers, would it?

A. Yes sir.

Q. Larger than is now necessary?

A. Larger stock of tin plate.

Q. Is there any loss of tin when it is being carried in stock, from its rusting or some other deteriorating causes?

A. Oh, yes, it is rusted sometimes. Carry it too long and it gets rusty, and then you can't use it. And carrying too long the lithographing, sometimes the atmosphere will pull it apart and it will transfer from the front of one sheet to the back of the other, and has to be thrown away or washed.

Q. Is the loss from that source one which you recognize and figure upon in the conduct of your business?

A. Well, we figure to use up a stock as fast as possible, so the tin don't lay around too long.

Q. But still it is a recognized——

A. Recognized loss. We figure out that the——

Q. Would that loss be increased if you attempted to comply with this law of North Dakota and put into all these plants these additional sheets, that would be required to take——

A. I think greater, because I don't think they could tell their wants as well as they could of the standard.

Cross-examination by Mr. FOWLER:

Q. I understand, Mr. Nichols, that the Chicago plant and the Kansas City plant, the tin is gathered together unassembled and shipped from there to the other plants and there assembled in the form of pails. Is that true?

A. The Kansas City and Chicago plants does the lithographing and cutting out of all Armour's pails.

Q. Now, take the Chicago plant and the pail end of it with which you are familiar, and take what is known as the five-pound pail. How many of those does the Chicago plant put out annually, approximately?

A. That is hard to say. We made them five and six thousand day

day for months at a time, but I wouldn't know how many annually.

Q. Well, take a day—average day. How many five-pound pails would you put out at the Chicago plant?

A. Well, if we were running five-pound pails of one brand, we would naturally run out 8,000.

Q. In a day?

A. Yes.

Q. Well, now, can't you, being superintendent there for thirty years, can't you give us an approximate idea of the number of five-pound pails you put out annually from the Chicago plant?

A. I couldn't tell you only from day to day. We work under orders. The refinery orders—

Q. Well, as I understand, one day you work on five-pound pails, the next day perhaps on other sizes?

A. No, possibly work on three sizes at once.

Q. Well, how many five-pound pails would you put out in an average month, we will say?

A. Well, I couldn't tell exactly how many.

93 Q. I don't ask exactly—just approximately?

A. I couldn't tell approximately. Some months they use more than others, and we work under the lard department's orders. They only order from day to day.

Q. Then, as I understand it, you can't give us any data, take an average month, on five-pound pails?

A. Not with any accuracy.

Q. Well, give us your best estimation?

A. Well, it may run one hundred thousand.

Q. One hundred thousand. Now, do you make any net weight pails now?

A. How is that? I didn't quite understand you.

Q. Do you make any net weight pails now?

A. Special, yes.

Q. Special?

A. Yes.

Q. That is for what trade?

A. For Park & Tilford.

Q. What?

A. For the firm of Park & Tilford.

Q. For the firm of Park & Tilford. And they are net weight. What is their net weight?

A. Three's, five and ten.

Q. Three, five and ten. Where is this firm located—in Chicago?

A. No, I believe they are a New York Firm.

Q. New York. And you make net weight pails for them now?

A. Yes sir. That is, we fill them.

Q. What?

A. We make them and fill them.

Q. Yes, make them and fill them. And have been doing that for how long?

A. I don't know, I am sure, a few years.

Q. A few years?

A. Yes.

Q. And do they—do these net weight pails go to the Mexican trade?

A. Go where?

Q. To Mexico?

A. I don't know.

Q. You don't know what trade they are used to supply? And in the making of these net weight pails, you would require a different die and a different machine that you described to Mr. Watson, then you would in making the standard weight pails, would you not?

A. Yes sir.

Q. Now, do you also make your tubs, these wooden tubs, and do you have charge of that?

A. No sir.

Q. Well, are they made there by Armour and Company themselves?

A. I don't know about that.

Q. You don't know about that?

A. No.

94 Q. As I understand, you figured that in order to change the Chicago plant and the Kansas City plant and those other plants to comply with the North Dakota law would involve an expenditure of \$11,337.46; is that correct?

A. Yes sir.

Q. Now, if Armour and Company should decide to supply the North Dakota trade from one plant, then the cost of course would be proportionately less, would it not?

A. Yes, I suppose if they decided.

Q. In other words, if Armour and Company, to comply with the North Dakota law, should decide to supply the North Dakota trade from Omaha simply, then the added cost of changing the machinery, etc., at Omaha to supply the North Dakota trade, of course, would be less than these figures that you have given here?

Mr. WATSON: I object to that as incompetent, for the reason that the witness has not been put upon the stand by us as qualified to speak generally as to the conduct of the business of the Company, but has been put upon the stand especially as qualified to speak upon the subject of the cost of making of tin cans, and that department alone of their work with which he is familiar. We didn't put him upon the stand as an expert or as qualified to speak upon the subject touching which counsel now interrogates him.

Q. Well, confine the question to the difference in case of the making of the tin pails, with which the witness is familiar then?

A. I don't know.

Mr. WATSON: Objected to for the same reason.

Mr. STRATTON: It seems to me the question suggested the practicability of doing that. The question assumes the practicability of doing that, which we don't admit.

Mr. FOWLER: I want it to be confined to the cost. I don't think it says anything about the practicability or assumes it.

The question was read by the reporter.

The COURT: What is your answer?

Exception by the defendant.

A. Well, they would have to start a tin shop. They couldn't do it without the help of either Chicago or Kansas City.

Q. Well, then, take the Chicago plant where they have the tin shop, and supply the North Dakota trade from the Chicago
95 plant. The added cost would be—in equipping the Chicago plant to supply the North Dakota trade—would be materially less, of course, than these figures you have given, would it not?

A. Yes.

Q. Now, in the Chicago plant you already have this machinery for supplying this firm in New York with net weight pails, have you not?

A. Not with Armour's style.

Q. But you have machinery there and dies to cut the pails?

A. Not Armour Style.

Q. But you have the machinery there to cut a five-pound net pail, have you not?

A. The Park & Tilford style.

Q. Do they differ from the Armour Style?

A. Yes sir.

Q. In the character of the pail?

A. Yes sir.

Q. In the form of the pail?

A. Yes sir. Armour's can is distinct from the Park & Tilford.

Recess 5 P. M.

Jan. 10, 1912—9.30 a. m.

Q. Mr. Nichols, in addition to these lard pails or cans, I believe you testified that Armour and Company also put out other cans in which they marketed their other products, such as corned beef, etc. That is true, is it not?

A. Yes sir.

Q. They have a number of different products which they market through these—through tin receptacles or cans, have they not?

A. Yes sir.

Q. And these cans are various sizes and patterns, are they not?

A. Yes sir.

Q. Some of them—take for instance—their corned beef can is of a different pattern than the lard—one of these lard pails, is it not?

A. Yes sir.

Q. Sort of square, oblong can, is it not?

A. Yes sir.

Q. Now, in purchasing this tin from the factory, Armour & Company buys it by the pound, does it not, instead of by the sheet?

A. Well, it is sold by the pound, the weight is, but it is bought by the square inch.

Q. I understand that is the way it is delivered, but you pay for it by the pound, don't you?

A. Well, the grade.

Q. Yes. Now, these cans here are not of the same size, are they? Take for example the twenty-pound can of White Cloud and the twenty-pound can of Vegetable; they are not the same size, are they?

A. No.

96 Q. The White Cloud can is a larger can?

A. Yes sir.

Q. And what is true with respect to the comparison between the White Cloud can and the Vegetole can is also true with respect to the cans that contain the Simon Pure leaf lard, is it not? That is a different size—the same size of can?

A. I don't quite catch you.

Q. Take for instance a twenty-pound pail of Simon Pure——

A. We make no twenty-pound pail of Simon Pure.

Q. Well, then, take a ten-pound; you make a ten-pound, don't you?

A. Yes sir.

Q. Now, the ten pound pail of Simon Pure is smaller than the ten-pound pail of White Cloud, is it not?

A. Different shape.

Q. Yes, different shape.

A. I don't know as it is any smaller in capacity.

Q. Well, now isn't it a fact that these pails, some of them, are larger than the others, because of the fact that the contents—density of the contents is different?

A. Them two sizes are.

Q. Do you supply any special trade such as this, other than this New York firm, with any of Armour's pails—other than Tilford & Park?

A. Park & Tilford.

Q. Oh, Park & Tilford. Do you supply anyone else?

A. That is their own pail. That is their own style of pail.

Q. I understand that, but do you make and supply anyone else other than them with a special style pail; any other firm?

Q. None that I remember.

Q. Do you supply them with the entire Armour line in their special pails such as the corned beef, etc.?

A. I don't know.

Q. Well, don't you know whether you make tin pails of their style, or tin cans for corned beef, of the Park & Tilford style?

A. Why Park & Tilford buys their stuff I suppose—whatever—corned beef isn't labeled. I don't know where they go.

Q. But you do make a special can for corned beef?

A. Special can?

Q. Other than the Armour can?

A. No.

Q. You don't? I think that is all.

Redirect examination by Mr. WATSON:

Q. Park & Tilford have a series of very high-class and expensive grocery stores in the city of New York, have they not, Mr. Nichols?

A. Yes sir.

97 Q. They cater to the most expensive trade in that city?

A. I believe so; at least they are located in the most expensive part of the city.

Q. They have the best grade of lard that Armour and Company make put up for their trade, do they?

A. I don't know what lard they put up.

Q. You don't know about lard; you are only authority on tin?

A. On tin. I don't go in the lard refinery once in three years.

Q. They have a special set of dies and a special set of electrotype plates for this can of theirs do they?

A. Yes sir.

Q. It is a different pail from the Armour pail altogether?

A. Yes, different shape.

Q. Different shape, and has, of course, the name "Park & Tilford" electroplated on it instead of "Armour," on the pail?

A. Yes, and different colors than the Armour color.

Q. Wouldn't be suitable for use for any other trade except that of Park & Tilford?

A. No.

Q. You have already given in your testimony, Mr. Nichols, an estimate of the added expense which Armour and Company would have to incur in order to put on the market pails conforming to the requirements of the North Dakota standard, have you not?

A. Yes sir.

Q. Now I will ask you whether Swift and Company, and Morris and the other packing concerns who are largely engaged in the putting up and selling of lard in pails would also be obliged to incur substantially the same expense in order to enable them to compete for this North Dakota business?

A. Yes sir, they would have the same expense.

Q. Do all of these large concerns put out several grades of lard?

A. Several brands?

Q. Several brands.

A. They have different labels on their pails.

Q. Do they put out in substantially the same size packages that you do?

A. Yes sir.

Q. Running up from the small packages to the large ones?

A. Yes sir.

Q. Now, do those packages compare with respect to the different grades of lard also?

A. I didn't catch it.

Q. I mean is the same grade of lard put out in the several sized packages by these other packers?

A. Why, they have different brands—labels. I never noticed the grade of lard, but I notice they put out a lot of different labels.

98 Q. But, what I mean, assuming another packer than Armour and Company has some particular brand of lard he puts out in packages. Now, will that packer put out that brand of lard in different sized packages, the same as you do?

A. Sure.

Q. Then, in order that he might compete with this North Dakota trade, it would be necessary for him to incur the same expense in the purchase of new electro-type plates and in the purchase of new dies, in the fixing over of machinery in the same way that you have testified Armour and Company would have to, would he?

A. Yes sir.

Q. What that be true, practically, of everybody who is engaged in putting up lard pail packages for the trade?

A. Yes sir, they can't make a larger pail only the dies—they have to—somebody has got to stand the expense.

Q. Now Armour and Company make their own pails, you have already testified?

A. Yes sir.

Q. Do the other large packers, as a rule, make their own pails also, same as you do?

A. Yes sir.

Q. Are there some, however, who buy these pails from independent can factories?

A. Yes sir.

Q. Or manufacturers?

A. Yes sir.

Q. Well, how would it be with the packer who buys these cans from a can factory?

A. Well, he would either have to furnish the dies or pay it in the price of the can—the pail.

Q. And the electro-plates?

A. Yes sir.

Q. If a packer not having a tin shop in connection with his packing house should simply buy the cans, he would have to furnish the electro-plates or pay the cost of them, would he?

A. Yes sir.

Q. And all that increased cost would come back to the packer and be charged up against the product, no matter whether he ran a tin factory as you do or bought pails from the factories?

A. Yes.

Q. Would be the same in either case?

A. Would be the same in either case.

Q. And all these expenses would necessarily be charged up against the product that was sold in that kind of package, would it?

A. It would be charged either direct or against the pails.

99 Q. How did you arrive at the figures which you gave in your testimony yesterday, touching the additional cost which would be incurred by Armour and Company in preparing to conform with the North Dakota standard pail, lard pail?

A. I took them off from our bills, the former dies and former electro-plates.

Q. That is to say, in making up your estimate, you based it upon the actual figures of recent purchases?

A. Yes sir.

Q. The most recent purchases?

A. Yes sir.

Q. So that this is not an estimate, but is——

A. Actual.

Q. It is absolutely accurate is it?

A. Yes sir.

Q. And you can say that that added expense would necessarily be incurred?

A. Yes sir.

Q. If the company complied with the requirements of this North Dakota law?

A. Yes sir.

Mr. FOWLER: In addition to the general objection, we move to strike that last question out as being a pure conclusion of the witness.

Denied.

Exception.

Recross-examination by Mr. FOWLER:

Q. Now, Mr. Nichols, you are familiar with the cans that Swift and Company and these other packers put out in the trade, are you?

A. I have seen them many a time; been in their factory.

Q. Isn't it a fact that Swift and Company make net weight cans?

A. I never saw one.

Q. Never saw one?

A. No.

Q. Isn't it a fact that they sent net weight cans up into North Dakota for a time?

A. I don't know.

Q. Don't know anything about that? I guess that is all.

Mr. WATSON: That is all, Mr. Nichols.

R. C. HOWE, recalled as a witness for the defendant, testified as follows:

Direct examination by Mr. WATSON:

Q. You have heard the testimony which has been given by Mr. Nichols, the superintendent of the tin shop at Chicago?

A. No.

Q. Have you?

A. No, I haven't.

100 Q. Well, he has testified substantially that an added expense of between eleven and twelve thousand dollars would necessarily be incurred by Armour and Company in the purchase of new electro-types, in the purchase of new dies, and other appliances and machinery which would be required in order to put out pails of

the North Dakota standard size, the size required by the North Dakota law. Have you gone over these figures with him, or have you checked up the figures he has made?

A. Yes, I have.

Q. What would you say as to the correctness of those?

A. Well, he has just figured on the actual machinery and equipment necessary for the different plants to take care of that trade.

Q. Well, from your knowledge of this subject would you say that that is a fair estimate of the actual given cost of complying with this law on the part of Armour and Company?

A. Yes, the prices, as I understand them, are actual cost of different appliances that are necessary, and all the appliances referred to are necessary to make up the cans.

Q. Now, I want to ask you, Mr. Howe, to also tell us whether any—whether there would be any further complications which would arise in the manner of the distribution of lard put up in pails of the North Dakota standard, and if so, what those complications would be.

Mr. FOWLER: It is understood this goes in under the general objection?

The COURT: Everything; all the testimony, it is understood, goes in under the general objection of course.

Overruled. Exception.

A. Any other method—our method of distribution is made from one central point, Chicago—

Q. Will you just turn around the other way so you will talk a little more towards the Court?

A. Our method of distribution is to centralize all of our orders in Chicago. The orders are all sent into Chicago and are distributed from the most available point. In other words, St. Louis or Chicago or Kansas City might have beef that would be suitable for Fargo, and Sioux City might not have it. The car would go to the most available point that had the supply necessary. Maybe next week Sioux City or Omaha, and maybe Omaha or Sioux City
101 wouldn't, and Kansas City would, so we would have to carry a stock of all our products at all of these points to be able to take care of the different branch house orders coming in.

Q. Will you tell the Court how many of these distributing branches, so-called, Armour and Company maintain in the United States?

A. About 350 branch houses. Besides that we run probably 150 cars, that is, distributing cars, where we have no branch houses.

Q. Just very briefly explain to the Court the business conducted by these 350 branch houses, of which one is located here in Fargo; the method of doing their business; how much of the products of Armour and Company they ordinarily keep on hand; how its supplies are replenished; to what office of your company their orders are always sent; etc., so that the Court may understand how that part of your business is taken care of?

A. The orders are sent from the different branches direct to Chi-

cago, and from Chicago they are distributed through the different plants that have the supplies and are most available—most accessible, and with the lowest freight rates, if possible, to these different branches. We often turn out a product in one packing house—a certain line of product that a branch house needs—and to make a full car we have got to fill the car from some other house—some house that wouldn't necessarily be in the territory that house is in. Very often in Omaha we are short of sixteen-pound hams, they ask for hams and we might have to ship a car from Chicago on that account, or we wouldn't have the class of beef needed here at Omaha, Sioux City or Chicago, and probably would have to ship from Kansas City. On that account Chicago would *would* decide that. They know what stocks are in each house. They get reports every morning of the available stock in each house.

Q. The executive force, in other words, of Armour and Company is maintained at the Chicago office?

A. At Chicago, yes.

Q. Then the branch houses order these cars according to their volume of business, I suppose?

A. A house like Fargo would use two carloads of stuff a week—yes, they would use three cars of stuff a week in Fargo. A house like St. Paul or Minneapolis might use ten or twelve and they distribute stuff through the different territories. A house like New York would use forty cars a week.

102 Q. Well, now, what figure, if anything, does the comparative freight rate from the different packing houses to the different branches cut in determining which one of your packing plants shall fill a given order?

A. Well, the freight rate to the northwest territory from practically all the packing points with the exception of the extreme south is practically the same.

Q. Well, then, what figure does the varying prices of hogs and cattle at Kansas City, Omaha and Chicago have in determining where an order—from what point an order shall be filled?

A. Well, we take Chicago, Kansas City, or we take Omaha, Kansas City and Sioux City, and try to distribute the product from those houses as much as possible through the west to save extra freight east, because the hogs are cheaper there; probably less than half the freight between Kansas City and Chicago. A man will ship his hogs right through to Chicago if he can't get very close to the Chicago price on the river. The same way on cattle, but if we can save say half the freight we can compete and cut out the Chicago packers in that western territory.

Q. Then why does it ever become necessary for you to ship products away from Chicago to Fargo?

A. For the simple reason I stated before, that we might have an assortment in a western house, as often happens, that would be suitable for territory that requires their shipment.

Q. As a rule, of course, all of the products of the packing houses move in carload lots, do they?

A. Branch houses take all their product in carload lots.

Q. Almost obliged to do that?

A. Except in emergencies.

Q. Except in emergencies. Now, when a branch house—we will say Fargo—wants a car of the packing house goods, will it be made up of practically all the products of the packing house, or will it be all one thing?

A. No, there is an assortment of practically everything we produce. We try to compel the branch house to keep the stock fresh at all times, and having a car coming in two or three times a week, they can always have a fresh supply of stock.

Q. It has been suggested upon cross examination of the previous witness, Mr. Howe, that one extra set of electro-plates and dies could be made for use, for instance at the Omaha packing house, and that Armour and Company could put out in that packing house all of the lard which was intended for use in the North Dakota trade. Will you explain to the Court whether that would be feasible, or practicable, and if not, state the reason?

A. You mean to establish a tin shop to cut, lithograph and — everything in Omaha, to supply the Dakota trade?

Q. Yes, and supply it from the product of the Omaha packing house.

A. We have no manufacturing tin shop in Omaha. We have none in other of our plants. We have the assembling shop there, and the blanks are cut out, covers stamped, bottoms stamped, bodies lithographed, in Chicago. We put them together.

Q. Assume, though, Mr. Howe, that that part of the prepared can could be done at the Chicago tin shop and that the parts thus prepared should be shipped in carload lots to Omaha, to be there assembled, but that all lard intended for the North Dakota trade should be packed and put up at the Omaha packing house?

A. That would be impossible for the simple reason, as I stated before, we don't always have the products required at the time orders come in. We might have been short at Omaha. We don't have cattle—the class of cattle they want here at all times; might have to ship from Kansas City, and if they didn't have pails at Kansas City, they would have to go without lard. We couldn't ship lard separately. The freight would eat it up. It takes two or three times as much as to ship in carload lots.

Q. And the lard must come with dressed beef?

A. The lard must come with dressed beef, hams, canned meat, soaps, anything else we have to send.

Q. And you never can tell from which packing house it would be sent?

A. Not three days ahead. We don't carry beef over three days in coolers.

Q. So all dressed meat that comes to Fargo—fresh dressed meat—must be drawn upon out of one of any of these packing houses?

A. Whichever house has it and has it at the lowest price put in here. All those things enter into it. It is not only dressed beef, but might be fresh pork cuts, or it might be hams one house hadn't and another would, or it might be bacon—can't tell.

Q. And those things must control in determine from which one of your packing houses the carload of meats for the Fargo branch is to be taken?

A. Yes sir.

104 Q. Would you say it would be impracticable and impossible to concentrate all that business from Fargo, for instance at the Omaha plant?

A. You couldn't do it. That is, you couldn't unless you would ship this lard by local freight rates and pay the local freight charge, and have the necessary delay. You couldn't tell whether you would have lard on hand or not. And another thing, — we should ship local freight and could make it, the additional freight would eat up our profit—put us out of business. We couldn't compete.

Q. What objection would you suggest to shipping the lard in carload lots from the Omaha plant, assuming that all of it was to be put up at the Omaha plant?

A. Well, if we shipped the lard in carload lots it would lay in storage. Some would get old on our hands. They don't use enough to take a carload at a time. We try to keep this fresh and keep a certain percentage in a car so they will have a fresh supply for the trade.

Q. While this lard is put up in practically air tight cans, does it nevertheless deteriorate with age?

A. It does.

Q. And in order to keep yourselves in your present position in the market as the producer of a wholesome and desirable article in that line, you must at all times see that the trade is supplied with the fresh article?

A. Yes, it is necessary, in more ways than appear on the surface. If we had this lard in the house for two or three weeks, the storekeeper is liable to have it a month, two months, or three months on his shelf. Besides, then the consumer has it for a time in the house. Now, if we can keep it in our house for a few days, a week, etc., and get it fresh to the trade, we know we have done away with that much trouble that might exist by having it old in the beginning. I had a case the other day where we took some lard away from a storekeeper. He didn't sell it and we refused to sell any more because we knew it would hurt us with the trade. We sell it on the brand. We expect the people to call for a brand.

Q. What other outlet have you for the sale of this package lard except as you supply it through these 350 branch houses that you referred to?

A. We sell at export. We sell it through car routes. We sell it direct to trade ourselves; that is, jobbers, wholesale grocery houses, mail order houses. In fact, our export houses as well as our trade with jobbers is very large.

Q. For instance, Mr. Howe, do the jobbers of Duluth, St. Paul, Minneapolis, Aberdeen, Watertown, Sioux City, Omaha, deal in these products of yours?

A. They do.

Q. Do they keep traveling men on the roads soliciting orders all the time?

A. They do.

Q. Do you know whether the territory of North Dakota, for instance, is covered by traveling men soliciting orders for the wholesale houses from one or more of the cities I have mentioned?

A. I think there is no doubt, in fact I know there is no doubt about it, especially mail order houses. They cover this extensively with their circulars, and sell stuff all through here, and the jobbers out of St. Paul, Minneapolis and I think also Sioux City and also some Omaha men travel through the western part of North Dakota.

Q. How about Aberdeen jobbers?

A. I don't know Aberdeen at all.

Q. Don't know anything about that?

A. No, but I should think they would.

Q. How about Chicago?

A. Chicago jobbers cover this whole territory.

Q. Where do these jobbers get their supplies of lard?

A. From the packing house.

Q. Well, I mean by the packing house in Chicago, or where?

A. Well, they get some of their supplies from Chicago, some from Omaha, and some from Sioux City—some from St. Louis, I can't tell where.

Q. Well, we will take for instance a jobber located at Duluth; would he be just as apt to get his supplies from you from the Chicago plant as he would from Kansas or Omaha?

A. In Duluth he would be just as liable to, yes sir.

Q. So that if a Duluth jobber were doing business in North Dakota, wishing to supply his North Dakota trade with Armour's lard, put up in pails, would it be possible for you to do business with him and always furnish him with lard put up in the Omaha plant?

A. No, I don't think so. We would have to give it to him wherever he bought.

Q. Suppose he ordered a car of your goods, they might have to come from Chicago?

A. They might. They could buy it in Chicago; they could buy anywhere. We can't dictate to them where they will buy their stuff.

Q. What I am getting at is this: How would this jobber located in Duluth be able to do business with you if he could only get lard suited for the North Dakota trade by purchasing it from your Omaha plant?

A. Well, he would have to buy straight carloads of lard to do that. I don't know of many jobbers that do that.

Q. Well, is the margin such that a jobber residing there could afford to confine his purchase of lard to simply one of your packing houses, or would it result in his buying lard of somebody else if all your establishments couldn't supply him?

A. Well, these jobbers do. They don't only buy lard from us, but buy from everybody in the country.

Q. I want to ask you also, Mr. Howe, about the practical em-

barrassments and difficulties which arise or which would arise from your company complying or attempting to comply with this law of North Dakota in the matter of changing the standard size of your lard pails. Assume now that you have done this and that you get an order for a jobber in St. Paul, Minneapolis, Duluth or Aberdeen for lard in pails. If the jobber wouldn't otherwise specify, I presume your house would furnish him with pails of your standard size, would you?

A. Yes sir.

Q. Then, of course, if the jobber in one of those cities has an order from North Dakota and supplies it with a pail which you have sold to him for sale in Minnesota or in South Dakota, the result is that the pails brought into North Dakota through a purchase from that jobber does not comply with the laws of North Dakota?

— That has occurred, not only here, but occurred places where the net weight stamp is necessary, where they ship from other states into that state. They don't care. It has caused a great deal of trouble, and shows the necessity for a uniform law.

Q. Now, what is the best you could do under such circumstances to prevent violations of the law?

A. We can't do a thing except to caution them. They pay no attention to it.

Q. That is, caution the jobber to whom you sell?

A. Yes.

Q. What caution do you give him?

A. We notify them we make a special lard for North Dakota, but they don't pay any attention—their shipping clerks don't pay any attention. They go and get a case of lard, take it out and ship it.

Q. Well, if a jobber in St. Paul, Minneapolis, or Duluth desired to comply with the laws of North Dakota, when he ordered lard from you he would have to apportion his order so as to take
107 part of it put up for the Minnesota trade and the balance of it put up for the North Dakota trade, would he?

A. Yes sir.

Q. Well, what effect, if any, would that have as to the size of the stock which he would have to carry on hand in all of the different grades of lard you put out, and in all different sizes of packages?

A. He would practically have to carry a double stock.

Q. What effect, if any, would the carrying of this double stock you have referred to, or larger stocks, on account of this diversity in the size of the pail, have upon the loss, if any, sustained by spoilage?

A. Well, it would have a very great effect. The lard trade in North Dakota is really small, and in carrying these assortments they couldn't use anywhere else, it would mean a good deal of stock would very often get old on our hands and probably some of it have to be returned and dumped.

Q. Would the situation be one which would be true of the local distributing houses as well as of the stocks carried by the wholesalers?

A. Be true of the distributing houses that carried two stocks, ye sir.

Q. It would also be true to some extent of the distributing houses?

A. That is, distributing houses that did business in more than one state.

Q. Well, what is the fact as to distributing houses doing business as a rule, in more than one state?

A. I think most all we have. Our house in Fargo does business in two states I know of.

Q. What would also be the situation as to the plants where these packages are kept?

A. We would, on account of not being able to concentrate our shipping to these points from one place continually, we would have to keep stocks at all our plants, some time for two or three months. We might not have a car for a month or six weeks out of a plant that would have a stock of lard. The lard would grow old on our hands and probably would in some cases get out of condition. There is one thing certain, it wouldn't give as much satisfaction to the consumer as freshly made lard, and you take lard six weeks old after it is taken from the plant and add to that the time it is kept by the store keeper and branch house, and I would say it would be liable to be out of condition.

Q. On account of the perishable character of fresh meat, is it or is it not a necessity of your business that the orders from the branch house be supplied promptly?

A. Very promptly, yes sir.

108 Q. It is a business that can't wait?

A. No.

Q. And when the dressed meat is going to move in response to an order from a branch house, ordinarily in order to make up a car, the other products of the packing house must go into the same car?

A. Must, it is the only way we can make up carloads.

Q. Then you couldn't wait until that order was received to put up lard in pails designed for North Dakota trade?

A. If we did it would delay the car and delay delivering it at the point of distribution.

Q. Then would it not be a necessity of the business, if you were going to comply with this North Dakota law, that you keep on hand, ready to ship, in each of the factories, or each of the refineries of your company, at these different cities, pails of lard of different grades in all the different sizes in which you put out your lard?

A. It would to give them the same services as we are giving them now, which is necessary.

Q. And the stock thus kept on hand, would it be available for any other trade than the trade of North Dakota?

A. Not any. We couldn't afford to use it anywhere else.

Q. Now, that would amount, as I understand, Mr. Howe, to your equipping your plants, to your putting out, and keeping constantly and in each of them, a supply of lard of all the different grades

and in all the different sized cans, for the sole purpose of supplying such trade as you had in the state of North Dakota?

A. Yes sir.

Q. Can you tell us substantially what that trade is per year?

A. The estimate given to me was about 1,800 or 2,000 tierces.

Q. Tierces?

A. Yes, from that up to 2,200, that is our trade.

Q. And about what proportion of that total sales of Armour and Company in North Dakota moves in tin pails or tins?

A. I think, well, the estimate for the year 1910—1911 figures aren't out yet—were about 1,200 tierces.

The COURT: How many pounds?

A. That would be 1,200 tierces. That would be equal to about 420,000 pounds, Judge.

Q. That would be about 60% of the total ?

A. Yes, 60% of our total sales.

Q. In North Dakota?

109 A. Yes sir. That is the figures I get from our branches. The COURT: How many pounds in a tierce?

—, About 350, Judge. 1,200 tierces.

Q. Taking into account, Mr. Howe, the added money expense of equipping the plants with dies, electro plates, and other appliances, and also figuring the additional expense incurred by the preparation of crates of the different sizes in which to ship them, and other expenses will you tell the Court what the added cost per pound of lard in pails would be, to lay it down in the state of North Dakota, in pails of the sizes, permitted by the North Dakota statute?

A. Well, to start with, the investment of \$11,300, I would figure wear and tear and interest on the investment, replacements, etc., would use itself up in five years. Machinery lasting five years of that kind, it would be a good long life for it. That is, figuring the interest and all, and aside from that the cost of keeping separate stocks, the loss on those, then damage on stocks held on hand, making separate crates, extra sized lumber in those crates, keeping track of the same and the interest on the investment carrying stock in different houses, would be at least $\frac{5}{8}$ ¢ a pound extra, I should think. On 420,000 pounds it would be probably a cent and a quarter a pound more on all the lard—not on the additional lard, but a cent and a quarter a pound more than you are paying today you would have to pay for all the lard that would be put up in the pail. That is not additional lard, but the whole contents of the pail would add a cent and a quarter to. In other words, the consumer would pay a cent and a quarter more than for the same lard he is getting now.

Q. Take in the case of this pail, Plaintiff's Exhibit A, which was sold to Professor Ladd at Fargo last September for 35¢, and assume that the current market price of that grade of lard was unchanged, that you had complied with the laws of the state of North Dakota and that you furnished to trade in North Dakota a pail which in all respects corresponded with this one except that it would contain an even number of pounds; what would be the different in the price

which you would have to charge for the new standard can, the difference per pound, I mean?

A. Well, the difference per pound would be $1\frac{1}{4}\epsilon$ a pound more than he paid for this.

Q. On the entire contents?

A. On the entire contents of that pail.

Q. And assuming that it contained three pounds?

110 A. They would have to pay also the additional cost or value of the additional weight on the basis of the selling price. That would be added as well.

Q. And also the additional cost of tin which would go into the larger package?

A. That is included in the cent and a quarter a pound extra.

Q. Well, could you figure substantially what that would make it?

A. The pail——

Q. The pail cost, yes.

A. Well, it wouldn't give you any comparison to do that because you see if this was made in even pounds, three pounds, you would get additional weight there, but to figure on this pail as it stands, we will say a customer gets a similar pail, and it was even weight, it would make a difference to him on the weight in here now of four cents. In other words, he bought this pail for 35¢. Figuring the same weight of lard in it now, it would cost 39¢ to use the different package.

Q. With the same amount of lard?

A. With the same amount of lard. That is, put up in the special size package. If it took a special size package to hold it.

Q. If he had the same amount of lard that is in there now, but put up in this larger pail, it would cost 39¢?

A. 39¢. In other words, he gets no benefit, but an extra cost.

Q. Well, now, Mr. Howe, will you explain to the Court why the added cost that you have been speaking of would be charged against the particular product that would come here to the state of North Dakota. Why wouldn't that be distributed over the entire cost of doing business of Armour and Company? Just explain that.

A. Well, we have to compete with probably 150 or 200 packers in the United States and we have to sell pretty close. If we started to distribute the extra charge on any commodity to our total business, why it would put us out of competition.

Q. In other words, the special cost against any particular product must be charged against that product?

A. Certainly; only way to trade.

Q. You couldn't do business any other way?

A. Could not.

Q. That is the ordinary way of doing business?

A. Yes, if a man comes in with a special order, it means a special price.

Q. We will suppose you engage in this North Dakota business at the extra cost to which you have testified and one of your
111 competitors elected not to engage in that business, then if you charged the extra cost against all business you would be at a disadvantage?

A. Our quotations would be whatever the difference is above, for we all buy our stuff in the open market and I don't think any of us has got the edge on the other.

Q. Well, is it therefore true that every packer would be obliged to charge against his North Dakota business whatever extra cost was incurred in doing that business?

A. I don't think there is any doubt about it. From a business standpoint he couldn't do anything else.

Q. And aside from this matter of cost, what would you say would be true as to whether the people of North Dakota would get lard as fresh and desirable under this change, if a change were accepted by the packer, as they are getting under the present system?

A. They would not.

Q. Well, why?

A. For the simple reason our lard is going out all the time. Our entire output today goes out tonight—very late at night or the next day. In this case, I say, some of our houses would have to have a stock put up in anticipation of shipment to North Dakota and might have to hold it more than six weeks, maybe two months.

Q. What objection would there be to your marking these changes in the factories and plants, say at Chicago, and then shipping out supplies to the other packing houses so that they could fill orders for North Dakota lard from these other factories without being equipped for the purpose of putting them up?

A. What would you mean; to fill pails of lard at Chicago?

Q. Yes.

A. Couldn't possibly do that.

Q. Why?

A. The extra cost of transportation would prevent us.

Q. You heard Mr. Nichol's testimony to the effect that all packers that were putting up lard for the North Dakota trade would be obliged to incur substantially the same expense that you would in the matter of the purchase of electro-plates, new dies, appliances and machinery, did you?

A. I didn't hear it, no, but they would be.

Q. What is the fact about that?

A. They would, certainly would, yes sir.

Q. Well, what is the fact as to all the large packers of the United States putting out their products under different brands, their own brands, and as to whether there are several of them?

A. They all have brands same as we have. They have got what they call grades of lard and also shortenings they sell to the trade, same as we have.

112 Q. Do they all sell substantially as many brands as you do?

A. I think all the large packers have.

Q. And state whether they put out these different brands in different packages and different sized tins, which correspond substantially to the sizes used by Armour and Company?

A. They do. All send it out in standard sizes, standard sizes used all over the United States, and for competition, they must make

packages, or we must make packages to correspond with theirs and they with ours.

Q. What would you say as to whether Armour and Company have ever spent any money in advertising in newspapers and in other ways the brands used upon their lard?

A. We have spent an enormous amount of money in developing and establishing a trade on our brands of lard.

Q. Is that built-up trade of Armour and Company of some value in dollars and cents as applied to its trade in North Dakota?

A. We feel that it has done a great deal to build up our trade, not only with the dealer, but especially with the consumer. It has created a demand among consumers which has compelled the dealer to keep in stock our brands of lard.

Q. I will ask you if that is true as applied to the state of North Dakota?

A. That I couldn't tell, but it is general and applies everywhere, I should say.

Q. You are not familiar with the North Dakota trade?

A. No, I should say everywhere.

Q. But that fact is true all other the United States?

A. Yes sir.

Q. And to some extent all over the world?

A. Everywhere.

Q. Your lard goes all over the world?

A. Everywhere.

Q. Well, where?

A. South Africa, China, Japan; we ship to Australia; we ship to South America, all over Europe, Alaska, Canada, United States and the South Sea Islands.

Q. Goes in these standard packages?

A. We ship in standard packages and ship in wooden packages; ship in anything they ask for.

Q. Ship all these different grades or brands?

A. Yes, we ship mostly on the Shield grade and the Simon Pure.

Q. Goes in the different sized cans, also?

A. Any size they ask for. We have shipped all sizes, yes sir.

113 Q. I mean is there a demand for them?

A. Demand for them in all sizes.

Q. And a demand for them in all these different brands?

A. Yes sir.

Q. That is true also in North Dakota, is it?

A. There is a demand for these in all different sizes. There is a greater demand for some sizes than others, but we must keep all sizes to supply the general demand.

Q. Now, is this demand for lard products, which you say now exists in the United States and all over the world, and which has been obtained at least by advertising, a valuable part of the business of Armour and Company?

A. Yes, it is.

Q. Assuming that a new concern were to start up, fully equipped

to do business and put out all these grades of lard, would it cost that concern time and money to establish an outlet for its products?

A. It has taken us about thirty years.

Q. That is a part of the business that has a money value in quite the same way that a piece of real estate has?

A. Yes. Now, I can probably explain that. In a packing house having probably a hundred products and by-products—maybe more—maybe twice that many—we must have an outlet for each one of them, and if our outlet for all isn't uniform, why we can't keep the place clear, so we must keep everything moving to be able to compete with the strongest of our competitors. If we didn't have the outlet abroad today for our lard that we have got—not only lard but other things—you would be selling hogs for three cents a pound alive.

Q. Do the pails which are used by Armour and Company bear a distinctive design which is characteristic of them and which is known to the trade?

A. Yes, you can tell an Armour pail both by the label and shape everywhere.

Q. Wherein is it distinctively different from the packages—pails put out by your competitors?

A. In the proportions of the pail in the first place, and further the coloring on the label in the second place.

Q. Why is that done; for what purpose?

A. Just as I said—advertising. People seeing that, see it is Armour's.

Q. Is that a valuable asset of the business?

A. Very much.

Q. Now, you have told of this additional cost per pound of the lard which would be necessarily incurred if it were put up in packages of the character prescribed by the North Dakota statute.

114 What would be the effect of putting this law into force as to its prohibiting the dealing in lard in that way?

A. I feel, without positively knowing, that it would practically put us out of business in pails in North Dakota. It would make the price of lard in pails so high people wouldn't use it.

Q. What would that mean?

A. It would mean they would have to go back to the old tierces and wooden packages.

Q. Would the same thing be true of the other packers?

A. Certainly. Everybody would be in the same position exactly.

Q. If it were possible for anybody to engage in this business at a profit, you think Armour and Company could do it?

A. I should hope so, naturally.

The COURT: Do you mean by that it would prevent shipping in the other sizes also?

A. Yes, I think the price would be prohibitive. The price would look so high people wouldn't buy.

Q. Now, I want to ask, Mr. Howe, about the feasibility of your using the present standard cans in order to comply with this North Dakota law; I mean, on the theory that you could take a larger can

and put a smaller quantity of lard in even pounds into that larger can. I want to know whether you could do that?

A. It could be done, but wouldn't look like a merchantable package.

Q. Now, let us go through the different sizes, because I want to see as to the effect on each one. Take the standard pail which is before you, Plaintiff's Exhibit "A," and which contains now a net weight of two pounds and six ounces. How nearly is that pail filled with lard?

A. That is filled almost to the top. It is filled as close as it can be filled so it can be handled without spilling over.

Q. It has already been brought out in testimony this lard is put in the pail in liquid form?

A. Yes sir.

Q. Does that mean it is bubbling and boiling as it comes in there?

A. No, in the form of rather a soft, white creamy substance, but in liquid form. It is hot. It occupies a little more space in liquid form than when it is cool or a different temperature. Hot lard will take more space—more cubic inches per pound than cold lard.

Q. Now we will assume you use that pail for the putting up of a two-pound net weight package. What would be the result? What kind of pail would you have?

A. Well, the pail would probably be filled about to there.

115 Q. There would be about four ounces to come out of there?

A. No, more.

Q. Six ounces?

A. Twelve ounces.

Q. No, there are two pounds, six ounces in it?

A. Ten ounces.

Q. Now, could you get three pounds of lard in that pail?

A. That would be impossible.

Q. It would be impossible, then assuming you are going to use that standard made pail so as to comply with the law of North Dakota. The only even number of pounds that—the largest number of even pounds you could put in there would be two, would it?

A. Two pounds, yes sir.

Q. Now, that would be six or eight ounces less than it now contains?

A. Six ounces less.

Q. Six ounces less. Well, would that leave an open unfilled space in the top of the can?

A. It would.

Q. Now, what are the objections to that?

A. Well, the pail wouldn't be sightly or merchantable. The people would feel they weren't getting the weight, even then, they were paying for. It wouldn't look well. It wouldn't be a merchantable or sightly package to put out to the trade. The pail would be filled, I should say, to about an inch or an inch and a quarter of the top.

Q. It wouldn't be merchantable?

A. It wouldn't be a merchantable looking article. It would be like a half finished package product.

Q. What would be the fact as to the waste in the amount of tin which would be used in the container?

A. Well, there would be a waste of probably an inch of the body of the can in tin.

Q. What would be the effect?

A. And people would be paying the freight on—not only the waste of tin—they would be paying the freight on that extra weight of that tin. They would be paying the extra cost of unnecessary tin and would be paying for extra freight of the extra weight and also for the extra labor in that case which was used on the tin for that case.

Q. There would be an economical waste all the way through?

A. There would be a waste all the way through. Of course it would naturally have to be paid by the ultimate consumer. He would have to pay the expense of it unnecessarily.

116 Q. Well, now, let's take the next size package. That is the five-pound?

A. Yes.

Q. How many——

A. Contains about four pounds, two——

Q. What is the net weight of that lard?

A. About four pounds, two ounces.

Q. About four pounds, two ounces?

A. I think so.

Q. Now, the four pounds and two ounces is all the lard you can get into that, can you?

A. That is and make a slightly package. That package is made to hold that lard to the best advantage—that amount of lard.

Q. What I mean is you can't have that can any smaller than that and still get four pounds two ounces in it?

A. Could not.

Q. And four pounds, two ounces fills the can?

A. Yes.

Q. You couldn't put any more lard in the can?

A. No.

Q. You could put four pounds in it?

A. Yes sir.

Q. If you put four pounds in it, there would be some loss and waste in the can, would there?

A. Yes sir.

Q. Same as described to the three pound can?

A. Yes.

Q. And would the same objections arise to the use of that can for that purpose as already stated for the use of the smaller can for the use of two pounds net: there would be the same objection?

A. Same objection.

Q. Now, then, suppose we take the ten pound pail. How much does that, how much lard is contained in that pail?

A. I don't remember just what that holds. I think about eighteen pounds.

Q. You mean this one; this is twenty?

A. This is twenty. About eighteen pounds.

Q. Holds about eighteen?

A. About eighteen pounds.

Q. Well, you could put eighteen pounds net in that?

A. Yes, that is what goes in. It is twenty pounds gross.

Q. Twenty pounds gross and eighteen net?

A. About eighteen net, I think.

Q. Then that particular can labelled with eighteen pounds would correspond with the North Dakota statute?

A. Yes sir.

Q. There would be one case where it would be identical?

A. I think—I don't know what the exact weight is.

Q. Don't know?

A. Even eighteen, I think.

117 Q. Then it would comply——

A. That pail does comply.

Q. And to the extent that is true, you would not have to buy more dies or extra electro-plates?

A. You would not on that one, but I want to say in regard to that pail, I don't think that we sell five per cent. of our output in that size.

Q. That is not a size which is so much used?

A. No.

Q. Well, which is the one most used.

A. The five pound and the three.

Q. The five and the three; they are the ones in which the bulk of sales is made?

A. I say that because I know it is so all over the United States.

Q. Well, what class of trade use the twenty and fifty pound pails?

A. Mostly grocery stores and small shops.

Q. Restaurants?

A. Yes, and restaurants and bakeries and little pastry shops.

Q. But ordinarily the housewife buys the three or five pound?

A. Buy these smaller packages almost entirely.

Q. Get it oftener and fresher?

A. Fresher and get it as often as they want it.

Q. Now, what is the objection to employing the cans which are slightly larger than the pails which contain lard. Is that true or not?

A. They are larger. It is necessary.

Q. The composition when it is—the composition is not so dense and not so heavy for a given number of cubic inches of contact?

A. It is not.

Q. It requires more space?

A. It does.

Q. Now, what is the objection to employing the cans which are ordinarily used for the compositions in putting up the lard, thereb

getting a little more space and increasing the weight to an even number of pounds?

A. Well, they are a different shaped pail and different sized pail, and as I said before, I don't think that you could put two pounds difference in that pail.

Q. Well, to start with, it would be necessary in any event, of course, to have a different electroplate?

A. Yes, to have—to change our plates to fit the sizes of the plate of tin. Now we run off, I think, six brands on a plate, and they fit the sheets—this "Shield Lard" is fitted for the size sheet of tin that is used in this size pail, and if we use it on that size sheet on one pail or near the top or down near the bottom, where one would be in the center, the other two would be out of position.

118 Q. Now, we will compare those two pails. Those are each twenty pounds, are they?

A. Both twenty pounds gross.

Q. They are, we will say, both twenty pound pails?

A. Yes.

Q. The one prepared for Helmet or leaf lard smaller than the one prepared for White Cloud?

A. About $\frac{3}{4}$ of an inch, I think, in height.

Q. Now, if you are going to use the dies and other appliances in the tin shop which are there for the purpose of making the White Cloud so as to make the tin larger than the one prepared for Helmet, you could do it with the use of the dies, as far as that is concerned?

A. The dies could be used, yes sir.

Q. You would, however, have to have a different electro-plate in order to print the brand on the size of the label?

A. To have it uniform, yes.

Q. So as to have it uniform?

A. Yes, because if we use the plate we have on this different size sheet of tin, it would throw part of the brands out of position on the pails; wouldn't be alike, in other words.

Q. And some in the center?

A. Others higher.

Q. Others higher; others lower?

A. Others higher; others lower.

Q. There would be no way of escaping that, would there?

A. No sir.

Q. Have you figured whether this larger can which is made for White Cloud would be sufficient in size to contain twenty pounds of lard?

A. I don't think it would. In fact, I know it wouldn't.

Q. Have you measured up the cubical contents?

A. I figured out the other day, but I don't remember, but I don't think it would. In fact I know it couldn't from the looks of it now. It won't hold—

Q. Well, considering the cans which are used for the Simon Pure lard, could you tell us whether those standard cans can be utilized

for putting up lard according to the directions of the North Dakota statute?

A. They could not.

Q. Could not. Have you got the figures on the net weight?

A. No, I haven't.

Q. Have any of you, gentlemen?

Mr. SIRRS: Same as on the other brands.

Q. You say just the same?

The COURT: Just a moment. We are getting mixed up here.

Mr. WATSON: We better leave that out. We will ask Mr. Sirrs about that.

Q. You have described at some length, Mr. Howe, the
119 methods adopted by Armour and Company in conducting this business of putting up and distributing lard in pails. I will ask you what, if anything, the experience of Armour and Company as packers has had to do with the working out of this existing method?

A. I don't know as I quite understand.

Q. Is the present method of packing and distributing lard, as you already testified exists, the result of the long experience of Armour and Company as the best method of doing it?

A. Why, yes, it developed through years and years of catering to the trade as to what would best suit the demand. After twenty-five years, as I stated yesterday, we worked up to this method of shipping, improving our shape, size of cans, but the weight of the lard and the contents of the can has never been changed.

Q. What, if any, influence has the element of competition which you have experienced at the hands of other packers had to do with the development of the business and its taking the form which it now presents?

A. Well, it is competition that compelled us to start to change to the smaller packages. That, as I said yesterday, started twenty-five years ago, and worked in different classes of package up to the present. We had to do it to compete with the same business.

Q. Of course during all this long period, one packer has been competing with another and the public has finally united in a demand practically for the handling of this business in a certain way?

A. The demand is for this package you see. If the demand of the public changed, why competition would meet that demand. The whole country calls for this class of goods put up in this style of package.

Q. And as a question of sanitation and as substantially the only method of getting into the hands of the ultimate consumer the product of lard in a pure form and keeping it in that form until used, is this the only practicable method?

A. The only one we have been able to find up to this time.

Q. You would say, in an essential way, the continuance of this method is an essential one?

A. No doubt of it.

Q. Otherwise means a return to the old unsanitary method?

A. To the old method. As I said a minute ago, we would have to go back to the old. I know nothing to take its place.

Mr. WATSON: You may inquire.

120 Cross-examination by Mr. FOWLER:

Q. Mr. Howe, selling the lard and in marketing the lard, it is marketed on a gross weight basis, is it not?

A. This lard is marked on its gross weight basis?

Q. In other words, you sell a five-pound can of lard which contains four pounds and two ounces to the trade on the five pound basis?

A. We do not. We mark on the back of the pail the amount of lard that is in there, or on the side.

Q. Well, but don't you charge upon the basis of five pounds—for a five pound can?

A. No. This lard is figured on the actual weight. Our price is made on the basis of tierce lard. Chicago today was \$9.40 for example. We would figure this lard on the amount of stuff in it, cost of the pail and extra label and putting it up. That would make our price of the lard net, say on a five pound pail $7\frac{7}{8}$ ¢ over the tierce basis and on a three pound pail I think a cent over on the contents that is in that pail. I figured that out yesterday and you have the actual figures on it.

Q. Now, I call your attention again to Exhibit "B," to which Judge Engerud called your attention yesterday. Isn't it a fact that that invoice is upon the basis of a gross weight?

A. That reads that way, yes sir.

Q. Yes sir. In other words, according to this invoice, the party to whom the sale was made pays the same price for tin as he pays for lard; isn't that true?

A. Yes sir.

Q. Yes. Now, Mr. Howe, you say that if you increase the size of, we will say this—your five pound pail, so as to make it five pounds net, that it will increase the cost to the consumer?

A. Yes sir.

Q. Then if you would reduce this five pound pail which contains four pounds and two ounces so as to contain four pounds even, it would reduce the cost to the consumer, would it not?

A. Not necessarily in the same ratio, no.

Q. But it would decrease the cost, wouldn't it? It would take less tin, wouldn't it?

A. It would take a little less tin.

Q. And take a smaller size crate, wouldn't it?

A. Yes.

Q. And it wouldn't cost as much freight to ship it, would it?

A. No.

Q. And then it would decrease the cost to the consumer then to a certain extent, wouldn't it?

121

A. Yes to an extent.

Q. All right then——

A. But just a moment——

Q. Well, just a moment. Now, what would be the objection to decreasing the size of the five pound can so as to contain an even four pounds we will say?

A. The same objection as would be to increasing it; the extra cost of installing new machinery and things of that kind.

Q. But that would be charged to the consumer, ultimately, wouldn't it?

A. The consumer would have to pay it. There isn't any doubt about it.

Q. It wouldn't make any difference to Armour and Company, would it?

A. It would make a difference of an extra investment in their business.

Q. They would charge that to the consumer, wouldn't they?

A. They would, but as I said, I don't think the volume of business would be enough to warrant——

Q. But, I say all that would be charged to the consumer?

A. The consumer would pay for it, yes.

Q. In other words, you are interested here in behalf of the consumer in this testimony?

A. We are interested here in behalf of our business.

Q. But it wouldn't make any difference to Armour and Company in the cost, would it?

A. Yes, it would in this way, that we feel—I feel personally, that to charge the extra cost or put any extra cost on this pail lard to the consumer, would put the pail lard off the market in North Dakota.

Q. But suppose you decreased it to four pounds, it would decrease it?

A. But I want to say this. The cost of the small amount of tin—the label would practically be the same, and so forth and the amount of tin you would save would be so small it wouldn't amount to much. Then to offset that, you understand you would have the extra cost to which I referred in making a special pail which would be incurred in making a larger pail. The same extra cost would apply in making a smaller pail.

Q. But it would all be charged against the consumer?

A. Yes.

Q. And would be paid by the consumer?

A. The amount of money we would save in the little tin wouldn't really amount to anything, but it would mean we would have to carry a special stock for that size for North Dakota same for the smaller as the larger.

Q. And you would charge it up against the trade?

A. Yes, it would cost the consumer more. If we made four pound pails it would cost the consumer more net for four pounds that it is today.

122 Q. But it wouldn't make any difference to you?

A. I don't care, if the consumer will pay it; here is the

difference. We are putting out an article, say pail lard. If a customer gets a pail of lard—old lard, that customer is going to call for some other brand.

Q. But, Mr. Howe, every one of your competitors that does business in North Dakota has got to comply with this law?

A. Got to do the same thing.

Q. Got to do the same thing. Then the basis of competition in North Dakota is the same?

A. Yes sir.

Q. Then you won't be ruined any more than anybody else?

A. We will be ruined this way, our trade will go to somebody else.

Q. But they won't trade with anybody not complying with the North Dakota law?

A. No.

Q. Then everybody must compete on the same basis under the North Dakota law?

A. Yes, but—

Q. Then everybody must compete on the same basis under the North Dakota law. I think the question can be answered yes or no?

A. Why yes, they compete on the same basis.

Mr. FOWLER: I think that is all.

Redirect examination by Mr. WATSON:

Q. Referring to this bill, Plaintiff's Exhibit "B," which was called to your attention by the counsel for the plaintiff. What do you mean by your answer that the price of lard was fixed by the gross weight of the pail, including its contents?

A. We sell all of our lard on a basis—on a tierce basis, which was the old standard, and which is the standard on the Board of Trade today. We add to the cost of the amount of lard net in that pail, the cost of the pail, cost of the label and manufacture and getting it out. That constitutes the price of a net weight of lard in there. Now if it is billed at 60 pounds that don't make any difference. He isn't charged any more for sixty pounds than if it was billed four pounds two ounces. We have based the price according to net weight. This bill is a year old.

Q. In other words, the expense of the small tin, label, of putting it up, etc., is simply bunched there as though it were so much per pound and were all lard?

A. Yes sir.

123 Q. It is more convenient to do that way than to separate it?

A. In figuring out it gives us a chance to put out a regular weekly list. All quotations are on a $\frac{1}{8}$ basis. In other words, this pail might be a cent over the tierce basis—the three costs,—and the five pound probably $\frac{7}{8}$ of a cent over tierce basis and ten-pound say $\frac{3}{4}$ and the 20-pound may be $\frac{1}{2}$ and the fifty might be $\frac{1}{4}$ - $\frac{3}{4}$. It figures out just—we figure and our competitors—we are all striving for the

trade—as close as we can get it, to get the cost of manufacture, cost of lard and cost of material in the pail.

Q. But I understand you to say that the cost of any one of these pails to the consumer—I mean to the purchaser—the retail dealer—is precisely the same as the cost to him of tierce lard plus the cost of the tin container?

A. Plus the cost of tin container and extra cost of putting it up in that s-style package, yes sir.

Q. The price of the lard then which is quoted in the tin container is based always upon the price of tierce lard?

A. Absolutely. The tierce basis fluctuates with the tierce basis in Chicago.

Q. How often do those prices change?

— We change our price on every $\frac{1}{8}$ cent change on the Board of Trade, either up or down.

Q. That is to say, whenever there is a change of $\frac{1}{8}$ cent on the Board of Trade in Chicago you make a change in all products?

A. All of our quotations.

Q. All of your quotations?

A. Yes sir.

Q. So that the price on lard varies from day to day with any changes or fluctuations on the Chicago Board of Trade?

A. A Yes of $\frac{1}{8}$ or over.

Q. Of $\frac{1}{8}$ or over?

A. Yes sir.

Q. If the fluctuations on the Board of Trade are less than $\frac{1}{8}$ ¢ a pound you make no changes in your price?

A. If the price went up say $7\frac{1}{2}$ ¢ a hundred, we wouldn't raise the price unless we felt bullish on the market, but we figure on a $\frac{1}{8}$ change. That is the general way. 8¢ means our change.

Q. Now, when changes of that kind are made by you on your lard products, do they apply to all of the lard products put up in all of the sized packages from tierces clear down to the three pound can?

A. Yes, I will show you—

Q. And does it—

A. I will show you how the branch houses—have you got
 124 one of our prices—I have got one right here. I will show you how it applies. We send a quotation to each branch house every day, that is, every day there is a change, and it is their basis. That case of lard of three's would be worth say at ten cents a pound, \$6.60, isn't it, f. o. b. Chicago basis. That is, tierce lard is ten cents. Now, you see the man can't make any mistake. We quote him tierce basis every day and he takes the price accordingly. It is uniform to all the trade.

Q. Is the paper marked Defendant's Exhibit 2 the one to which you have just been referring in your testimony?

A. Yes.

Q. Of what date was that price list put out?

A. This was December.

Q. December?

A. An old one I happened to pick up.

Q. December, 1911?

A. No, 1910, but the same thing applies. You see this schedule figured out to the different prices.

Q. Now, this schedule starts in with the price of lard in tierces, does it?

A. That is the basis of tierces.

Q. That is the basis, I understand, and then in the succeeding columns are shown the price of the other brands of lard in all of the different sized pails in which it is put up?

A. Yes.

Q. How are fluctuations in the market at Chicago as to the price of tierce lard communicated to the branch houses—by telegraph?

A. We telegraph every day.

Q. Now, when you send out telegrams to all these 350 branch houses, showing a change in the price of lard, do you give in that change anything further than upon the tierce lard?

A. No sir.

Q. Then they make up their list of all of the lard put up in tins from this basic price of tierce lard?

A. Yes sir.

Q. And this little slip which we have here, Defendant's Exhibit 2, shows how any given price of lard in the tierce is worked out as to the price of each of the different packages in all of the different grades?

A. In each different case. It is sold by the case.

Q. But it is worked out there?

A. Worked out for the man so he can't make any mistake.

Q. So, for instance, if a manager of a branch house received a telegram today that the price in Chicago of Simon Pure lard was 18¢, he would be able to figure out the price per case of that lard in 125 all the different sizes, and he could also figure out from that basic price of 18¢ in the tierce what the price would be for all of these different brands in all the different sized packages or pails?

A. Yes.

Q. And those prices are figured out so as to cover the cost of the pail and the additional labor of putting it out to the trade in that form?

A. Exactly.

Q. At no additional profit?

A. No additional profit figured on it.

Q. Whatever?

A. None whatever.

Q. So that Armour and Company are not realizing thereon more of profit in the sale of this lard in small packages than they are in the sale of it by the tierce?

A. Not a cent more.

Q. Not a cent more?

— — —
Mr. WATSON: We offer in evidence Defendant's Exhibit 2.

Mr. FOWLER: Same objection and the further objection no proper foundation laid.

Overruled. Exception.

Recross-examination by Mr. FOWLER:

Q. I just want to call your attention to Exhibit B again. Now, referring again, Mr. Howe, to Exhibit B, in the first line contained in that instrument this reads, as I interpret it, "One case," "Cs" is case, isn't it?

A. That is supposed to be, I suppose.

Q. "12" is the number?

A. Yes.

—, "5's" refers to the five pound Shield lard tin, does it not?

A. I should think so.

—, "60" refers to the pounds?

A. It is supposed to refer to the pounds.

Q. And $16\frac{7}{8}$ is the price?

A. Yes.

Q. And this is the total price?

A. Yes.

Mr. FOWLER: That is all.

Redirect examination by Mr. WATSON:

Q. Upon your cross examination a few moments ago, by Mr. Fowler, when he was pressing the question that you were viewing the matter from the standpoint of the consumer and was trying to make it appear that if the consumer would pay this added price which would be imposed equally upon all competitors in the business, it was a matter of no difference to Armour and Company, you endeavored to make some explanation of why it would be a detriment and loss to Armour and Company and you didn't complete that explanation. Counsel didn't give you an opportunity? Will you make any explanation which you desire on that subject?

A. I tried to explain even though all competitors were in the same position that wouldn't relieve Armour and Company. In case the customer got a pail of Armour's lard that was old and didn't give satisfaction, they would call for someone else's. They might get a pail of someone else's that was fresh. The result would be they wouldn't use ours again. The same thing might apply to the other people. At the same time that doesn't do a brand any good that we have spent years of time and money on, and that we have established. There is a selfish motive. We have established this brand, paid for advertising, and we want to keep it good.

Q. Do you want to supply fresh lard to the customer?

A. Certainly. If we can't we don't want to.

Recross-examination by Mr. FOWLER:

Q. Anyone of your competitors would have the same trouble keeping fresh lard up here?

A. He would probably feel the same as I do.

Q. Certainly.

A. Catering to the public is what we are doing.

G. C. Fox, called as a witness for the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. WATSON:

Q. Where do you live, Mr. Fox?

A. Chicago.

Q. What is your age?

A. Thirty-one.

Q. And your business?

A. Refinery superintendent.

Q. What is that?

A. Refinery superintendent.

Q. Of the plant of Armour and Company?

A. Yes sir.

Q. At Chicago?

A. With the general supervision of all points.

Q. Supervision of their other plants also?

A. That department.

Q. How long have you been in the service of Armour and Company?

A. Ten years.

Q. You have grown up in this business, then, have you?

A. Yes sir.

Q. What other position have you occupied with Armour and Company?

A. Came right out of college to the Armour business.

Q. Your entire business experience then has been with Armour and Company?

127 A. Yes sir.

Q. What college were you graduated at?

A. University of Illinois.

Q. Lard is essentially a pastry shortening, is it?

A. Yes sir.

Q. You have heard the testimony that has been given in this case here; most of it, have you?

A. Yes sir.

Q. Substantially all of it. I want to ask you, Mr. Fox, about other pastry shortenings, which are in common use in this country and which do not come within the designation or classification of either lards, lard compounds and lard substitutes. Tell me, to start with, if there are such other articles in commercial and general use for pastry shortening purposes and which do not come within and are not included within any one of the three terms which I have just used?

A. There are.

Q. Now what are they?

A. Crisco, put up by the Proctor & Gamble Company; Vegetine,

put up by the Vegetable Product Company, I believe; olive oil, peanut oil, cocoanut oil, cottonseed oil.

Q. Why do you say that these articles which you have just mentioned are not included, for instance, within the term "lard substitute?"

A. Because they are not made from animal products or under the common term of lard. They are wholly vegetable products.

Q. You take it that the word "lard substitute" generically refers to some substance which has some of the characteristics of lard, at least in its being derived from an animal.

A. Yes sir.

Q. Well, take the case of olive oil. Historically, olive oil has been used for shortening purposes very much longer than lard, hasn't it?

A. Yes sir.

Q. That has been used from the earliest times?

A. I understand so, yes sir.

Q. Well, now, you know as a historical fact what form of pastry shortening has, from the most ancient times, been used by the Jews, for instance, and in fact in the time of Rome?

A. Well, I have read from historical accounts olive oil and vegetable oils were used for that purpose, perhaps by the Jews, but it is a well known fact that they are not using pork products.

Q. So that, historically speaking, in view of the much greater age of the use of olive oil for shortening purposes, the lard
128 would be the substitute rather than oil would be the substitute, is that it?

A. In that sense, yes.

Q. Is that what you mean?

A. Yes.

Q. How about butter?

A. Butter is used for the same purpose as lard or might be used for the same purpose as lard.

Q. That is, for pastry shortening purposes?

A. Yes sir.

Q. Well, now will you tell us how extensively these other articles which you have just enumerated, and which you say are used for the same purposes, but which do not come under the name of either lard, lard compounds or lard substitutes, are used at the present time in the United States?

A. Well, to a considerable extent. They are growing more and more in use constantly.

Q. Well, now, tell us about the different ones, will you? You have mentioned the first one, I think, Crisco.

A. The product Crisco is a new product—new vegetable product. It is put out under the Pure Food Law; doesn't come within the jurisdiction of the meat inspection law, owing to the fact that there are no animal products in it. It is a hardened cotton seed oil. By their secret process they are enabled to make cottonseed oil hard and merchantable, and it has been recently introduced in the trade, throughout the domestic trade.

Q. It is now being largely advertised in the current magazines and newspapers?

A. Very largely; Saturday Evening Post, Ladies Home Journal and in the magazines.

Q. Is it having an extensive sale?

A. Quite a good sale as I understand it.

Q. It is put out by Proctor & Gamble?

A. It is.

Q. Let's see, are they the great soap manufacturers of Cincinnati?

A. They are.

Q. One of the largest soap manufacturers in the world?

A. I believe so.

Q. That is their trade name for this article, is it?

A. It is.

Q. Is it used for shortening purposes?

A. It is.

Q. Contains no animal fat whatever?

A. No sir.

Q. Did you mention Wesson's Snow Drift Oil?

A. No, I didn't mention Wesson's Snow Drift Oil, but I did mention cottonseed oil. Wesson's Snow Drift Oil is a cotton seed oil.

129 Q. Well, cottonseed oil, as used for shortening purposes, is a comparatively recent use, is it?

A. It is.

Q. Well, how extensively is cottonseed oil in its different forms and under its different trade names employed for shortening purposes?

A. Very extensively.

Q. Is it an active competitor of lard or lard substitutes and compounds?

A. Absolutely.

Q. You recognize that as a very strong competitor in the field?

A. I do.

Q. Is it advertised extensively?

A. It is.

Q. I will just ask you if in a recent issue of the Ladies Home Journal there was an entire page there devoted to the advertising of that particular brand of Cotton Seed Oil?

A. There was.

Q. Do you know how much it costs a page for one insertion in the Ladies Home Journal for that advertisement?

A. I have heard it costs \$6,000.

Q. Now is that a sample—a fair sample of the extent to which the use of cotton seed oil, under various trade names, is being purchased at the present time as a pastry shortening?

A. I didn't quite catch you.

(The question was read by the reporter.)

A. It is.

Q. Do you know for what period of time cotton seed oil has been used for shortening purposes, Mr. Fox?

A. Well, I can't say exactly, but I expect twenty years. It has been improved from time to time since then.

Q. Armour and Company turn out nothing in the form of a pastry shortening which does not contain animal fat?

A. They do not.

Q. In other words, all of these products that we have heard about in the trial of this case contain animal fat, either from the hog or from the steer, do they?

A. Yes sir.

Q. We take for instance the Simon Pure lard. That is wholly made from the fat of the hog?

A. From the leaf fat of the hog.

Q. From the leaf fat of the hog. And Shield and Helmet are both made entirely from the fat of the hog?

A. Made entirely from the edible fat of the hog.

Q. Now, what is Vegetole made from?

A. It is made from Cotton Seed Oil and Olea Stearine.

Q. Now, of course, the cotton seed oil there is a vegetable product?

130 A. It is.

Q. What is the oleo stearine?

A. An animal, beef, product.

Q. That comes from the beef?

A. Yes.

Q. Now in that product there isn't used any of the fat of the hog at all?

A. No sir.

Q. What is a proper designation for that product, selecting your designation from the three names used in the North Dakota statute, which are lard, lard substitute and lard compound?

A. The White Cloud and Vegetole?

Q. No, we are talking about Vegetole now. Would you call that a lard compound or lard substitute?

A. That would be a lard substitute.

Q. Would be a lard substitute?

A. Yes sir.

Q. Why would you call it a lard substitute?

A. Because it is made the same general consistency of lard, it is made partly from an animal product and it is used for pastry shortening as lard is used.

Q. But it does contain the animal fat?

A. It does contain the animal fat.

Q. Or some proportion of animal fat?

A. Yes sir.

Q. Now we will take the product which you put out known as White Cloud. What is that composed of?

A. Cottonseed oil and oleo stearine.

Q. And that is the same as Vegetole except that it has been bleached?

A. That is the idea.

Q. It is white where Vegetole is yellow?

A. Yes sir.

Q. Is the composition of it the same as the composition of Vegetole?

A. Yes sir.

Q. That is to say, it is made up of cotton seed oil and oleo stearine?

A. It is.

Q. It has none of the fat of the hog in it?

A. It has not.

Q. You would also designate that product, then, as a lard substitute?

A. Lard substitute.

Q. Lard substitute. Do Armour and Company put out any product which would be called lard compound?

A. They do not.

Mr. FOWLER: In addition to the general objection, I object to this because it is a pure, simply conclusion of the witness.

Overruled. Exception.

Q. Well, you would designate, from your knowledge of
131 these products, that all the products that Armour and Company put out along this line are either lard or they are lard substitutes; is that right?

Q. That is right.

Q. You mentioned peanut oil as a substance used for shortening purposes, did you?

A. Yes sir.

Q. Is that extensively used?

A. Not as extensively as cotton seed oil, though it is growing more and more in use.

Q. The cultivation of the peanut is increasing very greatly, is it not, all the time?

A. Yes.

Q. The products of the peanut, in form of butter and oil, are coming on to the market in increasing quantities all the time?

A. They are.

Q. Is peanut oil a recognized commercial product at the present time to be used for shortening purposes?

A. It is.

Q. It, of course, is a vegetable, I presume?

A. Yes.

Q. You would call that a vegetable product, would you?

A. I would.

Q. Of course, there is none of the animal fat in that oil?

A. There is not.

Q. Used for the same purposes or any of the same purposes as lard or its substitutes would be used?

A. It is.

Q. Is there a product known as Vegatine which is a product of the cocoanut, sometimes known as cocoanut oil on the market?

A. There is.

Q. What is the nature of that oil and for what purpose is it used?

A. That is a vegetable oil used for shortening—vegetable product.

Q. Is that on the market in considerable commercial quantities?

A. It is to some extent.

Q. You recognize it as a competitor, to some extent?

A. I do.

Q. You do. What did you say that was made from—cocoanut?

A. Yes sir.

Q. Do you know the product which is turned out by the Phoenix Cotton Oil Company of Memphis, Tennessee, called Gander brand?

A. I do.

Q. That is used for cooking and salad oil?

A. It is.

Q. Shortening purposes?

A. It is.

Q. There is an entire page of advertisement of that oil in a recent paper?

A. There is.

132 Q. Is that becoming a competitor of lard and lard substitutes in the kitchen for pastry purposes?

A. It is a very great competitor right now.

The COURT: What is that made of?

A. Cotton seed oil.

Q. Have you mentioned all the brands of this cotton seed oil, or are there a great many of them put out by different companies?

A. There are.

Q. Great many?

A. Great many.

Q. These are just a few samples we picked up?

A. Just a few, yes sir.

Q. Does that oil enter into the export trade also, as well as domestic consumption in the United States?

A. It does.

Q. You meet with it in foreign competition?

A. We do.

Q. All of these products of Armour and Company along the lard line are subject to the inspection under the meat laws of the United States?

A. They are.

Q. As containing an animal fat?

A. They are.

Q. But these other oils such as cocoanut oil, cotton seed oil, peanut oil, and others which contain no animal fat; are they subject to inspection under the United States laws relating to meats?

A. They are not.

Q. Because they are vegetable products and have no meat or meat fats in them?

A. That is a fact.

Recess to 2:30 P. M.

Q. Mr. Fox, you see these twenty pails and cans exhibited on the table here, do you?

A. Yes sir.

Q. They were brought up from Chicago, were they?

A. They were.

Q. They were here for exhibition and used upon the trial of this case?

A. They were.

Q. Are those the standard sizes of cans and tin pails referred to in the testimony and used by Armour and Company in connection with the packing and distribution of their lard products?

A. They are.

Q. Is that the standard size of pail and construction of pail which is used in the distribution of lard from all of the plants of Armour and Company?

A. It is.

Q. Are those containers identical in every respect with the containers which are actually sent out in the distribution of lard products from all of those refineries, save in the fact that the summer lids were not brought here with these pails, and save also that the net weight of the contents, as the same would be after the cans
133 have been packed, does not appear on them?

A. They are.

Q. These are all empty cans, are they?

A. They are.

Q. They contain no lard?

A. They do not.

Q. And this net weight tag is not affixed to any of these cans until after the can has been filled with lard?

A. They are not.

Mr. WATSON: May it please the Court, we have had a photograph of these twenty cans taken during the noon recess and upon the development of the photograph we will submit it to counsel tomorrow and ask to have the photograph received in evidence in lieu of the introduction of the originals. We will produce the exhibit to counsel tomorrow before we offer it in evidence.

Cross-examination by Mr. FOWLER:

Q. Mr. Fox, you say you are superintendent of the—general superintendent of the refinery department for Armour and Company?

A. I am.

Q. You are familiar, of course, with the ingredients and constituents of these various brands of lard?

A. I am.

Q. Taking up now the Simon Pure brand, what are the constituents of that brand?

A. Pure leaf lard, one hundred per cent.

Q. Pure leaf lard, one hundred per cent. What do you mean by leaf lard?

A. It is a piece of lard of piece of fat in each hog right around the kidneys, known as the leaf. It varies in weight from four to nine pounds, depending upon the size of the hog. This leaf is taken out of the hog on the killing floor, transferred to trucks and taken to open kettles where it is rendered by means of jacketed steam until the rendered fat is all taken out as completely as we can with our modern processes, and this rendered fat is drawn off into the pails you see before you, under the Simon Pure brand.

Q. At what temperature is that done?

A. About 240°.

Q. And so that this Simon Pure lard contains no other lard than leaf lard?

A. Absolutely not.

Q. And that is taken from the hog?

A. Yes.

Q. Is that Simon Pure put up in five sizes of containers also?

A. It is not.

Q. Just put up in three?

A. For the general trade.

Q. And how about your export trade?

A. Three sizes.

134 Q. Three sizes for export trade. Well, do you have some specials of that?

A. Oh, we might put up if asked for—requested—but the general trade is confined to the three sizes.

Q. That is, three, five and ten?

A. That is three five and ten gross weight.

Q. Now, this is your best grade of lard, is it not?

A. Yes sir.

Q. And your most expensive?

A. Yes sir.

Q. Take your Helmet grade of lard, what are the constituents of that?

A. Leaf and back fat.

Q. And no other kind of lard except leaf and back fat?

A. No other kind.

Q. And what temperature is that?

A. Approximately the same temperature, 240°.

Q. That is put up in five sizes of containers?

A. No, that is put up in the buckets and cans; also tubs and tierces.

Q. Well, it is put up in five sizes of cans, isn't it?

A. No, it is not.

Q. What size cans is it put up in?

A. Buckets and cans, twenty pounds gross and fifty pound gross.

Q. You don't put it up in smaller sizes?

A. Do not.

Q. You call these "pails" as distinguished from "buckets," do you?

A. Yes sir.

Q. Now,—and is that put up in special sizes too?

A. We have never had a request for it in smaller sizes.

The COURT: What is Helmet made up of?

A. Leaf and back fat.

The COURT: What is back fat?

A. Back fat is the body fat of the hog. That is the fat on the back except the skin. The skin is taken off by machinery, leaving a solid fat.

Q. Is there any fixed proportion of back fat and leaf lard?

A. Approximately half and half.

Q. Approximately half and half in your Helmet?

A. Yes.

Q. That is put in the same temperature as your Simon Pure?

A. Yes sir.

Q. Now, taking up the Shield brand, what are the constituent lards in that—fats?

A. All of the sweet, clear, clean, edible fats of the hog.

135 Q. Well, now would there be some leaf lard?

A. Might be.

Q. And some back?

A. Yes sir.

Q. Some intestinal?

A. No intestinal.

Q. What other kind?

A. Well, that covers about all, leaf, the body fats and the inner fats that are edible. Intestines are not edible. They are considered inedible fat.

Q. And what temperature is that put in?

A. That is rendered in closed kettles at from thirty-five to forty pounds of steam. The temperature would be from 280° to 300° and possibly more, depending on the dryness of the steam.

Q. Now, is the Helmet lard rendered in open or closed kettle?

A. Open kettle.

A. And Shield brand is put up in five sizes of cans, is it?

A. It is.

Q. Or pails. Did you state the temperature at which the Shield brand was rendered?

A. I stated it, yes sir.

Q. You did? Now, take up this next one there, Vegetole; what are the constituents of that?

A. Cotton seed oil and oleo stearine.

Q. This oleo stearine is a fat from the steer, is it?

A. It is.

Q. What are the relative proportions?

A. Approximately 4/5 of the oil to 1/5 of the stearine.

Q. And rendered in open or closed tubs?

A. Well, the stearine is a product of the press. That is, the butter tallow of the steer is rendered in open kettles and that stock is subsequently pressed in hydraulic presses whereby the oil, which is known as oleo oil, is pressed out and the remaining hard residue is known as oleo stearine, which we utilize as a hardener for the cotton seed oil.

Q. Sort of binder?

A. Binding agent.

Q. And that is all the constituents in this Vegetole, is it?

A. Just the oil and——

Q. And binder?

A. And binder oil.

Q. Proportions about one to five, you say?

A. $1/5$ and $4/5$.

Q. That is put up in the five sizes of pails?

A. It is.

Q. Now, what make up this White Cloud brand; what are the constituents of that?

A. That is the same, cotton seed oil and oleo stearine.

136 Q. It is made in the same manner as Vegetole, is it?

A. Made in the same manner except the oil in the product is bleached.

Q. One is colored white and the other yellow?

A. One is yellow; the other white, and in Vegetole we make a selection of the cotton seed oil, requiring a dark color and harder oil.

Q. Is there any difference in the density?

A. No.

Q. They why is it, Mr. Fox, you have a larger can for your White Cloud than Vegetole?

A. That is in the mechanical manipulation.

Q. In what way?

A. In binding cotton seed oil and oleo stearine, it is very necessary that the product be carefully and completely bound and packed by machinery and this gives it—this puffs it up, requiring more space in a pail for the same weight than that in the Vegetole. In the Vegetole it is a perfectly flat product, because we are not arriving at a light color. It is a great deal like the beating of an egg.

Q. That is what gives the white color instead of bleaching; I understand you to say White Cloud was bleached?

A. It is.

Q. By that process?

A. No, by other processes, but that is a part of the process.

Q. Part of it. How is this put up? In about the same method as to the oleo stearine?

A. Yes, the oleo stearine is exactly the same in both products. It is made in the same method and delivered to us as a department in the same way.

Q. And this is put up in the five sizes of container?

A. It is.

Q. Now, these all—all of these products, I understand, contain animal fats.

A. They do.

Q. The first two from the hog and these others from the steer?

A. They do.

Q. The Crisco, you say, does not contain animal fat?

A. It contains no animal fat.

Q. What are the constituents of Crisco?

A. We assume them to be cotton seed oil. We have every reason to believe that Crisco is hardened cotton seed oil, although the ingredient is not shown on the label.

Q. Have you made analyses of it?

A. Yes.

Q. What did they show?

A. It proved to us that it was cotton seed oil.

Q. Cotton seed oil?

A. Hardened cotton seed oil.

Q. Now this Crisco is a white color, is it not?

A. Yes.

137 Q. Resembles lard very closely in color?

A. It does.

Q. And also resembles lard very closely in consistency and density?

A. It does.

Q. It is used for all purposes to which lard is put?

A. It is.

Q. Frying and other things, the same as lard is used?

A. It is.

Q. How long has Crisco been on the market?

A. Oh, about a year, I should say. I don't know definitely, but I should think about a year.

Q. Being widely advertised, I believe you testified?

A. It is.

Q. And quite a strong competitor, probable competitor, of lard?

A. Very strong.

Q. Very strong?

A. Very strong.

Q. And very successful or likely to be a very successful competitor?

A. They are.

Q. Now, you take these other articles that you have testified to, Vegetine, Peanut oil, coconut oil, cotton seed oil; they also compete with the lard?

A. They do.

Q. And they, to a greater or less extent, answer and can be used for the same purpose as lard?

A. They can.

Q. They are all vegetable compounds, of course?

A. All vegetable products.

Q. Products. And they, to a greater or less extent, are competitors with the lard?

A. They are.

Q. And are intended and do take the place of lard?

A. They do.

Q. Serve as a substitute for lard?

A. They do.

Q. Well, did I understand you to say that olive oil was used now in this day and age, in this country, as a substitute for lard as a shortening?

A. It may be used for the same purposes.

Q. Well, is it used?

A. Well, I think it is.

Q. It would be an expensive shortener, wouldn't it be?

A. Very true, but lots of people would have it at the cost.

Q. The same way lots of people use butter?

A. Yes sir.

Q. The same way lots of people use oleomargarine?

A. Yes.

Q. All substitutes for lard?

A. Used for the same purposes for which lard is used.

Q. Oleomargarine is a competitor of lard, is it not, to a certain extent?

A. It is.

138 Mr. FOWLER: I guess that is all.

Mr. WATSON: That is all, Mr. Fox.

R. L. RUDDICK, called as a witness for the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. WATSON:

Q. Where do you live, Mr. Ruddick?

A. Minneapolis.

Q. What is your age?

A. Forty-nine.

Q. What business are you engaged in?

A. With Armour and Company.

Q. In what capacity?

A. Superintendent of branch houses.

Q. How long have you been with Armour and Company?

A. About nineteen years.

Q. In what different branches of the service?

A. Well, I have had charge of the selling practically all the time, in about the same position, with the exception of a few years when I was in Chicago as assistant general manager of all the branch houses.

Q. Your headquarters are St. Paul, you say?

A. Minneapolis.

Q. What territory is embraced under your supervision?

A. From Sault Ste. Marie to Glendive, Montana, and from Ft. Dodge, Iowa, north to—well Canadian Northwest.

Q. Including portions of Manitoba or Canada?

A. Practically all of Canada from Port Arthur West to Calgary.

Q. Then your territory embraces North Dakota also, does it?

A. Yes sir.

Q. How many distributing houses of Armour and Company are under your supervision and jurisdiction?

A. There are twenty-four, including what we call sub-agencies. That is, we have some houses where we don't have a clerical force and they are handled under other houses.

Q. One of those houses is at Fargo?

A. Yes sir.

Q. Have you any other house in North Dakota?

A. Grand Forks.

Q. Those are the only two?

A. Those are the only two parent houses. We have two sub-agencies, one at Minot and one at Bismarek.

Q. Armour and Company have no slaughtering establishment or rendering houses or refining plants in North Dakota?

A. No sir.

Q. You heard the testimony, Mr. Ruddick, to the effect that some 1,800 to 2,200 tierces of lard were sold by Armour and Company in North Dakota annually?

A. Yes sir.

Q. Those figures are correct, are they?

A. Yes sir, I presume so. About 2,000.

139 Q. And also about 60% of the total sales of Armour and Company in North Dakota of lard are in tin pails or cans?

A. Yes sir.

Q. Is that estimate also correct?

A. That is approximately correct, yes sir.

Q. What proportion would you say, of the sales of Armour and Company of lard in North Dakota, come through the local agencies at Fargo and Grand Forks and the sub-agencies at Minot and Bismarek, or could you form an estimate on that point?

A. You mean of the total amount of Armour's lard sold in the state?

Q. Yes.

A. That would be impossible for me to say, because wholesale groceries sell considerable lard in the state.

Q. That is what I wanted to lead up to. As a matter of fact, then your four distributing agencies in North Dakota do not supply all of this lard to the trade?

A. No sir.

Q. Now, will you tell the Court through what other agencies your lard reaches the retailers of North Dakota than through the four agencies of Armour and Company?

A. Well, practically all of the wholesale grocery houses of Duluth, Minneapolis, St. Paul, Aberdeen, Crookston, Thief River Falls, and Sioux City, the jobbers, all of the jobbers practically—Chicago jobbers, mail order houses like Montgomery Ward, Sears Roebuck, all sell goods through the state more or less, and we sell practically all of these people. We never know where the lard is going when they buy it. They come in and buy five or ten or fifteen cases of lard, or a hundred; some few of them a car; never tell us where they are going to sell it.

Q. And a jobber located at any one of those cities sending out a consignment of groceries to some retail grocer in North Dakota is very likely to include in the consignment a few pails of lard?

A. Yes sir, if he can get the order.

Q. Well, I mean, as a matter of fact you say a good deal of your lard comes into the state in that way, do you not?

A. I think it does, not only ours, but every other packer's.

Q. Every other packer's?

A. Yes.

Q. Now, assuming, Mr. Ruddick, that your Company complied with the law of North Dakota in the matter of the standard size of pail for putting up lard, how would this—how would the product be handled, and how would it get into this state? What would
140 be the difficulties encountered in connection therewith, through these wholesalers and jobbers that you have mentioned?

A. I don't think it would be possible for the jobber to carry two stocks of lard, one especially for this one state, for the reason that if he did his lard would probably grow old on his hands. The demand from one state would be so small with most of them that they couldn't keep the stocks in condition, and we would have the same trouble ourselves. We have now—I have to caution these houses and watch their stock reports all the time. If a house has a little too much of any one thing, I move it to some other house.

Q. Why do you do that?

A. So as to clean it up while it is fresh; keep it from getting out of condition; save losses.

Q. That statement of yours in respect of stock applies to lard as well as to hams or other products of the packeries?

A. Yes, sir, applies to everything. I have moved lard from this state.

Q. You do that in order that the people—the consumer may always be able to get the fresh product?

A. We do it for two principal reasons; the first is, of course, to save us from loss, and the second is, indirectly to save us from loss, and as we want our goods to give the very best satisfaction and go to the trade in the very best condition so as to advertise our brands and bring us further business.

Q. Now, I will ask you where the orders for supplying all these branch houses which are under your jurisdiction are sent in the first instance?

A. They all go to Chicago.

Q. Do they go through your office?

A. No sir.

Q. And these orders are then distributed by the Chicago house?

A. Yes sir.

Q. What are the facts which determine the distribution of those orders?

A. It depends upon two or three things. In the first place, our shipping is mainly controlled by our fresh product. If we are shipping a car, for instance, to Aberdeen, or Fargo, or Grand Forks, the order sheet would go to the beef department. They say from what point they want to ship. They have on their desks each morning the record of cattle killed, what the cost, quality of the cattle, different grades, etc., and know what markets they are suitable for. They

will direct that the car be loaded from the point at which they will have suitable stock for the branch house. That might be—
 141 our cars sometimes ship from Chicago, sometimes Omaha, sometimes Sioux City, sometimes Kansas City, occasionally from Ft. Worth, and from St. Louis.

Q. The dressed meats which you have, for instance, at different establishments will vary in quality and price at different times?

A. Yes sir, the live markets vary, and also the killing percentage of the beef will vary, on account of different things and there are times when certain markets will not get a run of good or medium cattle, or not get cows and another market gets cows. They want cows at certain branch houses. Others get steers. Have to be governed accordingly.

Q. You have to handle those orders to the best advantage?

A. Yes, sir, that is the reason we concentrated all our executive force at Chicago from all the different packing houses, so as to handle the business in better shape, instead of having a house—packing house—handle different territory as we did a great many years ago.

Q. These six branch houses of Armour and Company all have a private telegraph wire connected with the Chicago house; are in communication all the time?

A. Yes sir.

Q. These orders are distributed without any loss of time or delay?

A. Yes sir.

Q. Now, will you tell us if these packing house products coming to a branch house move in carload lots?

A. Practically all of them.

Q. Couldn't afford to pay local rates on them?

A. No sir.

Q. Well, will there be more than one kind of packing house product contained in any given car?

A. Usually—well, I might say that I don't think there has ever been a car shipped to any of these small houses that didn't contain a great many different articles.

Q. We are referring to Fargo and Grand Forks.

A. I don't think Fargo has ever had a straight car of fresh meat; never been market enough.

Q. Ordinarily, what would be contained in the car?

A. Oh, there would be provisions and lard and fresh meats, such as beef and fresh pork cuts, sausage, possibly some pickled meats, pickled pigs' feet, little of everything that comes in the packing house line, sometimes soap—canned meats—extracts.

Q. The car would be filled up to the minimum capacity in order to secure a carload rate?

A. Yes sir.

142 Q. The orders are always sent in for at least a car at a time?

A. We insist upon it, and when there is not a full car we wire them for weight. That is, when we happen to be short of any article and

can't put it in the car and can't make the weight, we wire the house for additional weight to make weight for a car.

Q. So as to fill up the car and get the benefit of a lower rate on the car?

A. Yes sir.

Mr. WATSON: You may inquire.

Cross-examination by Mr. FOWLER:

Q. What percentage—or put it this way; referring to this lard that is sold in these different size pails, which size of pail do you sell the most of in North Dakota?

A. I don't believe I could answer that intelligently.

Q. Well, your best judgment, Mr. Ruddick?

A. I think the largest sellers are the three's, five's, ten's and the fifty's, probably.

Q. The three's, five's and ten's are what might be known as the housekeeper sizes, smaller sizes?

A. Yes sir, I would say so.

Q. You would say so. What do you call three's; is this one here a three?

A. Yes sir, that is what they call a three, gross.

Q. What they call a three, gross. What does that three mean?

A. That was what was known as a three-pound gross pail.

Q. A three pound gross pail. Does that mean that as it stands there now it weighs three pounds?

A. Yes sir.

Q. You can't say as between these three sizes that you have given, whether the three and five pound gross pails, whether you would sell more of them in North Dakota than the fifty's?

A. Well, it would only be a guess. I would say that I think there would be more call for the three's and five's probably. That is simply a guess on my part.

Q. Now on these—take for instance Exhibit "A," this one here, "Establishment 2-c" indicates what establishment?

A. That indicates the government label number.

Q. Well, but doesn't "2-C" indicate one of your houses?

A. Yes sir.

Q. Well, which one?

A. South Omaha.

Q. South Omaha; so that that shipment would be made from South Omaha, that pail there?

A. Yes.

143 Q. Now, where are most of the shipments made to North Dakota from; what establishment?

A. I don't know that I could tell you that. They are split up between South Omaha, Kansas City, Sioux City and Chicago mostly, with, I think, a few cars occasionally from St. Louis.

Q. That is, I am referring now to shipments to North Dakota?

A. Yes sir.

Q. Well, which—can you say which establishment would ship the most here?

A. Well, that would lie, I think, between Omaha, Sioux City and Kansas City; probably those three.

Q. You think they would ship about equally here?

A. Well, I am not just familiar with how they have been shipping recently from those points, but my impression is that they are probably shipping more from Sioux City and Omaha than they are from Kansas City, with the exception possibly the last three or four months. Freight rates are about as favorable as against one of these points as another. There isn't very much difference. There is a little.

Q. You think most of the shipments would be from Kansas City and Sioux City up here?

A. Well, now, I should think most of the shipments would probably be from—take it here—Omaha and Sioux City.

Q. From Omaha and Sioux City?

A. Yes, with occasional shipments from Chicago and Kansas City.

Q. That is Omaha, Nebraska, and Sioux City, Iowa?

A. Yes.

Q. You have two main houses and two sub-agencies in North Dakota?

A. Yes sir.

Q. These four agencies supply the North Dakota trade, aside from what little is sold through the jobbers, do they?

A. Yes sir, with the exception of Aberdeen, which supplies a part of the state along the south line, along the South Dakota line.

Q. The orders are sent in from out over the state into your branch house at Fargo and that house supplies those orders; that is the method, is it?

A. No sir, the orders would be sent in direct to the sub-agencies or to Fargo or Grand Forks or Aberdeen, wherever the salesman was working out of.

Q. Well, let's take a concrete example. Take a merchant down in Ransom County, Lisbon, which would be tributary to Fargo. If he wanted to order some lard from Armour and Company, he would send his order in here to the Fargo house, would he?

A. Lisbon?

Q. Yes.

A. No sir, that would be sent to Aberdeen.

Q. Is that in the Aberdeen territory?

A. Yes sir.

144 Q. Well, take a merchant at Casselton, then, which is twenty miles west of Fargo?

A. That would come to Fargo.

Q. That would come to Fargo? He would send his order in here and then the shipment would be made from here, would it?

A. Yes sir.

Q. And is there just an arbitrary division of the state into territory?

A. Between our houses?

Q. Yes.

A. Yes sir.

Q. So that orders originating in that territory are referred to those houses that have that territory?

A. As a rule. Sometimes mail orders may go into another house, or a traveling man be sick or a man slip over, or have a particular friend wants to buy from him; don't want to buy from a salesman of the other house, and we allow them to lap over.

Q. And Mr. Sirrs here is manager of your Fargo office?

A. Yes sir.

Q. Has been for a number of years last past?

A. Several years, yes sir.

Q. You have a manager at the Grand Forks house?

A. Mr. Kinman.

Q. And you have managers at the sub-agencies?

A. No sir, we have a man in charge. We don't call them managers.

Q. Now, Armour and Company, they have a pretty complete refrigeration system, haven't they?

A. Yes sir.

Q. Refrigerator cars?

A. Yes sir.

Q. And at all of these agencies and sub-agencies they have a pretty good refrigeration system to keep the fresh meat?

A. At these sub-agencies we have no refrigerators such as an ice box as we have here at the branch house. We simply have a car on the track.

Q. But take the Fargo branch house for instance, you have a complete refrigeration plant here?

A. Yes sir. That is, an ice refrigerator, not artificial refrigeration.

Q. And under government inspection?

A. Yes sir.

Q. Well, what do you mean by not artificial?

A. I mean an ice machine.

Q. Well, you have a plant here in which you can keep your fresh meat for a reasonable time?

A. Yes sir.

Q. How long?

A. Well, that would depend a great deal upon the condition of the atmosphere.

Q. Yes, I realize that.

A. Depend upon the humidity and upon the heat—temperature.

145 Q. Well, take a summer month. Take the month of July, for instance.

Q. Well, month of July; that would depend upon so many things, it would be almost impossible to give any fixed time.

Q. Well, can't you give an estimate between the two?

A. It would depend upon the condition of the meats themselves.

Q. Well, give us an average estimate, Mr. Ruddick; just your best judgment?

A. Well, there is so much difference. I might say I have seen meats go off in less than a week, get out of condition in less than a week, and I have seen meats keep two months.

Q. Well, Armour and Company aims and does have the best appliances for keeping meat on the market, I presume?

A. Yes sir.

Q. Best there are to be had in that regard?

A. We think so.

Q. Well, now, lard, of course, keeps longer, I take it, than fresh meat, doesn't it?

A. Yes sir.

Q. Considerably longer, of course?

A. Yes sir.

Q. Take a branch house, is lard kept in the refrigerator?

A. No sir.

Q. Just kept out in the warehouse?

A. Yes.

Q. Well, it is not kept in refrigerators, as I understand you to say—not kept in refrigerators?

A. No, except occasionally they may set some lard in; might set some Simon Pure lard in.

Q. Well, now, in handling your business, I presume you make shipments from one North Dakota house to another North Dakota house or agency, if the demand requires?

A. Well, we don't aim to. We do when they run out and have to have something on short notice. We aim to have a car come from the packing houses to the various branch houses and sub-agencies, so as to save additional expense, extra freight.

Q. Those are Armour and Company's private cars these products are shipped in?

A. Yes sir.

Q. Refrigerator cars?

A. Yes sir.

Q. So that the product goes from the packing house to the sub-agencies under ice, so to speak; they are refrigerator cars?

A. Yes.

Mr. FOWLER: I guess that is all.

(Dictated by Mr. WATSON:.) It is now stipulated between counsel that the defendant, in lieu of introducing in evidence the tin pails and cans referred to in the testimony, and which are now in the court room, may introduce as a part of its defense in this case a photograph showing all of such pails and cans, taken this day in the court room, and subject to its right to introduce such photograph as soon as the same has been developed by the photographer, the defendant now rests.

Mr. FOWLER: I can't stipulate to that until we see the photographs. I don't know how well they will represent the cans. They may show exactly, and of course we want to reserve the right to enter any objections. I don't want it understood we are waiving any objections by this stipulation. All I understand, you are reserving

the right to introduce them, to which we have no objection, but we may want to make objection to the photographs.

In view of the absence of Mr. Engerud, the Court took a recess until January 11, 1912, at 9:30 A. M., at which time Court convened, Mr. Engerud then being present.

Mr. WATSON: It is stipulated that the witness, Mr. Ruddick, in giving his testimony yesterday, when inquired of on the subject of a shipment of merchandise from a branch house to Lisbon, thought the question referred to the town of Linton, and hence stated the shipment would be made from Aberdeen, and that if the shipment were being made to Lisbon, it would be from the Fargo branch.

Mr. FOWLER: We have no further testimony, if the Court please.

Mr. WATSON: We rest also.

Mr. WATSON: The defendant at this time renews at length the motion made at the conclusion of the evidence submitted by the state, and in addition thereto also specifies the following grounds for dismissal of the proceeding, namely, that it now appears from the evidence in the case, from the uncontradicted evidence in the case, that the statute in question is an unreasonable police regulation, not based or founded upon any necessity requiring its enactment, and that as applied to defendant's business in the State of North Dakota, the same in effect does take its property without due process of law, and in its operation denies to the defendant the equal protection of the laws.

(Ruling reserved.)

Mr. ENGERUD: The labels on the pails can be described into the record on each brand.

The COURT: Mr. Watson, I think Judge Engerud suggests a method by which you can read right into the record what each
147 one of those labels contains and that will supply it.

Mr. WATSON: We now offer in evidence Defendant's Exhibit 3, which is a photograph of the twenty containers, pails, and tins, produced in Court and referred to in the evidence in the case, and by stipulation of counsel, for the purpose of supplying the failure of the photograph to plainly bring out the contents of the face label upon each of the containers, the following are brought into the record as being a true statement of the face label on each of them, namely:

Upon the face of each of the three containers used for Simon Pure leaf lard there is contained the following words, to-wit: "Armour's Simon Pure Leaf Lard. Open Kettle. Armour and Company. U. S. Inspected and passed under the Act of Congress of June 30, 1906. Establishment 2-A." Upon the reverse side of the can is contained the following: "Keep this pail covered and in a cool place. Simon Pure Leaf Lard is 100% leaf and is sensitive as butter in the absorption of foreign odors. To preserve its high quality and delicate flavor, follow instructions above." The containers have no other words upon them.

Mr. ENGERUD: You can simply repeat the other two containers have the same.

Mr. WATSON: The foregoing is all of the language to be found on the outside of these packages. The two larger sized packages used in packing and marketing Simon Pure Leaf lard contain the same labels and the same language upon the sides and rear as above recited.

The two cans used for packing and marketing Helmet have the following face label: "Armour's Helmet Pure Lard, Open Kettle. Armour and Company. U. S. Inspected and Passed under the Act of Congress of June 30, 1906. Establishment 2-A." They contain no other language.

The cans in which is put up Shield Brand are five in number and each contains the following face label: "Armour's Shield Pure Lard. Armour and Company. U. S. Inspected and Passed under the Act of Congress of June 30, 1906. Establishment 2-A." This is the only language found upon the cans.

The Vegetole pails and containers for Vegetole bear the following face label: "Armour's Vegetole Shortening. Made from Oleo Stearine and Selected Cotton Seed Oil, with Vegetable Color. 148 Armour and Company. U. S. Inspected and Passed under the Act of Congress of June 30, 1906. Establishment 2-A." The containers have no other words upon them. There are five of these cans for Vegetole.

There are five cans or containers for White Cloud, and each of them bears upon its face the following words: "Armour's White Cloud. Composed only of Cotton Seed Oil and Oleo Stearine. Armour and Company. U. S. Inspected and Passed under the Act of Congress of June 30, 1906. Establishment 2-A." These containers have no other words upon them.

Mr. ENGERUD: No objection to the photograph as a photograph, and it is objected to for the same reasons, and only the same reasons, that the cans themselves would be objected to, namely, on the ground it is irrelevant and immaterial. No objections to the use of the photograph for all purposes instead of the pails.

Both rest.

Motion renewed by defendant same as before, for the same reasons. Ruling reserved.

January 20, 1912:

Motion denied.

Exception saved.

149

Title.

Criminal Information.

The the District Court in and for said County:

Arthur W. Fowler, State's Attorney, in and for the said county of Cass and State of North Dakota, in the name and by the authority of the State of North Dakota, informs this Court that heretofore,

to-wit: On the 8th day of September, in the year of our Lord One Thousand Nine Hundred and Eleven, at Fargo, in the County of Cass, in the State of North Dakota, Armour & Company, (which said Armour & Company was then and there a corporation organized and existing under the laws of the State of New Jersey) did wilfully and unlawfully offer for sale and sell to one E. F. Ladd a quantity of lard, not in bulk, which said lard was then and there put up, sold and delivered to said E. F. Ladd in a pail which then and there held more than two pounds and less than three pounds net weight of lard; and which said pail or container did not then and there have or display on the face label thereof true net weight of said lard, and did not have or display on said face label the true name and address of the producer of said product, and did not have or display on said face label the true name and address of the jobber of said product.

This against the peace and dignity of the State of North Dakota, and contrary to the form of statute in such cases made and provided.

Dated this 15th day of September, 1911.

ARTHUR W. FOWLER,

State's Attorney in and for Cass Co., North Dakota.

150 STATE OF NORTH DAKOTA,

County of Cass, ss:

Arthur W. Fowler being first duly sworn, on oath says, that he is the duly elected, qualified and acting State's Attorney in and for said County of Cass; that he has read the above information and knows the contents thereof, and that he is informed and verily believes that the facts set forth therein are true and from said knowledge, information and belief he states the same to be true.

(Signed)

ARTHUR W. FOWLER.

Subscribed and sworn to before me this 15th day of September, 1911.

E. C. GEAREY, JR.,

Clerk of District Court, Cass County, North Dakota.

[Endorsed:] 2854. Filed in the office of Clerk of District Court, Cass County, N. D., Apr. 8, 1912. E. C. Gearey, Jr., Clerk. By A. T. Comstock, Deputy.

151

Title.

Order Settling Statement of Case.

It appearing to the satisfaction of the court that on the 14th day of March, 1912, being within the time allowed by statute and by the order of the court, the defendant served his proposed statement of the case upon the plaintiff, and there being no amendments to said proposed statement of the case, and the parties having agreed thereto as — the statement of the case, and said proposed statement of the

case being on this 8th day of March, 1912, presented to the court for settlement, with stipulation of plaintiff that same may be settled as the statement of case herein:

Therefore, The court hereby certifies that the foregoing and attached statement of the case, as proposed, which statement contains pages numbered 1 to 65, and with assignments of error and specifications of insufficiency of the evidence thereto attached, together with exhibits, is allowed and settled as the statement of case in the above entitled action.

I hereby certify that the foregoing statement of case is a true and correct statement of case in the above entitled action and contains all the evidence offered and the proceedings had upon the trial thereof, including all objections, motions, ruling and exceptions, and the foregoing papers marked respectively as Plff's Exs. A & B and def't's Exs. 1, 2 and 3 are the original exhibits referred to as marked herein.

Dated April 8th, 1912.

CHAS. A. POLLOCK,
Judge of the District Court.

152

Term Minutes.

September Term, A. D. 1911, October 5th, 1911.

Now court convenes pursuant to adjournment.

Present: Honorable Chas. A. Pollock, Judge presiding and officers of the Court, and now court is duly opened.

THE STATE OF NORTH DAKOTA, Plaintiff,

vs.

ARMOUR PACKING COMPANY, Defendant.

The above entitled matter coming before the court the plaintiff appears by Arthur W. Fowler, State's Attorney, W. S. Stambaugh, Assistant State's Attorney, and Messrs. Engerud, Holt & Frame, and the defendant by its attorneys Messrs. Ball, Watson, Young & Lawrence.

Now the defendant files its demurrer to the information and on hearing the demurrer and due consideration the court makes his order over-ruling the same: to which ruling exception is taken by the defendant and noted.

And now being called to plead the defendant pleads not guilty.

153

Term Minutes.

January Term, A. D. 1912, January 9.

Court convened pursuant to adjournment.

Present: Hon. Chas. A. Pollock, judge presiding and officers of the court.

Court is duly opened.

STATE OF NORTH DAKOTA, Plaintiff,
vs.
ARMOUR PACKING COMPANY, Defendant.

Now the above entitled cause being called for hearing and trial, the plaintiff appears by State's Attorney Fowler and Edward Engerud of counsel, and the defendant by its attorneys Ball, Watson, Young and Lawrence and A. B. Stratton of counsel.

And now by consent of the defendant the information is amended.

And now the defendant asks that the demurrer heretofore interposed against the complaint in its original form may now be considered by the court as presented to the complaint in its present form.

It is so ordered and the demurrer is overruled.

Now the defendant appears before the court and pleads not guilty to the complaint as amended.

It is now stipulated in open court between the respective parties that a trial by jury be and the same is hereby waived, and that the issues in said action shall be tried by the court without a jury with the same force and effect as if a jury were impanelled and sworn to try the cause.

Now E. F. Ladd is called and sworn and testified in behalf of plaintiff.

Now the state rests its cause in chief.

And now at the close of state's case, the defendant moves the dismissal of the action and the motion is denied.

Now the defendant calls E. F. Ladd for further cross examination.

Now the state rests and the motion of the defendant for dismissal is considered as renewed and is denied by the court.

Now the court takes a recess until 2 o'clock P. M.

Now at 2 o'clock P. M. the court reconvenes pursuant to recess.

Now R. C. Howe is called and testifies on behalf of the defendant.

154 Now J. W. Nichols is called and sworn and testifies on behalf of the defendant.

Now at 5 o'clock P. M. court adjourns until 9:30 A. M. January 10, 1912.

E. C. GEAREY, JR., *Clerk.*

155

Term Minutes.

January Term, A. D. 1912, January 10.

Now at 9:30 A. M. court reconvenes pursuant to adjournment.
Present: Hon. Chas. A. Pollock judge presiding and officers of the court.

Court is duly opened.

THE STATE OF NORTH DAKOTA, Plaintiff,
vs.
ARMOUR PACKING COMPANY, Defendant.

Now trial of the above entitled cause is resumed with J. W. Nichols on the stand testifying on direct examination in behalf of the defendant.

Now R. C. Howe is recalled for further examination on behalf of defendant.

Now G. G. Fox is called and sworn and testifies on behalf of defendant.

Now court takes a recess until 2 o'clock P. M.

Now at 2 o'clock P. M. court reconvenes pursuant to recess.

STATE OF NORTH DAKOTA, Plaintiff,
vs.
ARMOUR PACKING Co., Defendant.

Now the trial of the above entitled action is resumed.

Now R. L. Ruddick is called, sworn and testifies in behalf of the defendant.

Now defendant rests with the right to introduce a certain photograph.

Now the plaintiff asks a continuance until 9:30 A. M. Jan. 11, 1912.

Now court adjourns until 9:30 A. M. January 11, 1912.

January 11, 1912.

Now at 9:30 A. M. court reconvenes pursuant to adjournment.

Present: Hon. Chas. A. Pollock Judge presiding and officers of the court.

STATE OF NORTH DAKOTA, Plaintiff,
vs.
ARMOUR PACKING Co., Defendant.

156 Now the State and defendant rest, save with the right to introduce that certain photograph heretofore referred to.

Now the cause rests.

Now both parties having rested, the defendant renews its motion made at the close of the state's case, but specifying additional grounds as a cause for dismissal and the motion is now argued before the court.

During the argument the photograph heretofore referred to is introduced in evidence and marked defendant's exhibit 3.

Now the cause rests and the motion for dismissal heretofore made is considered as renewed at this time and argument continued.

Now court adjourns until 9:30 A. M. January 12, 1912.

(Case continued until the 15th.)

January 15, 1912.

Now at 9:30 o'clock A. M. court reconvenes pursuant to adjournment.

Present: The Hon. Chas. A. Pollock, Judge presiding and officers of the court.

Now court is duly opened.

STATE OF NORTH DAKOTA, Plaintiff,

vs.

THE ARMOUR PACKING COMPANY, Defendant.

The court being engaged in the preparation of his decision in the above entitled action during the day, now at 5:30 P. M. o'clock, court adjourns until January 16, 1912 at 9:30 A. M.

157 Please Remit to This Address.

630 Northern Pacific.

FARGO, N. D., Apr. 2, 1910. 191-.

M Aneta Merc. Co., Aneta, N. D., Bought of Armour and Company.

Terms Cash.

Package goods are sold weight when packed; no allowance made for natural shrinkage. Wrapped meats are sold by gross weight.

Form 560-Style A-Small-2 milliam. 1-22-12-Req. 77894.

PLAINTIFF'S EXHIBIT B.

Wm. C. Green.

1 cs. 12/5 shld. Lard	60	16 7/8	10.13
1 cs. 20/3 "	60	16 7/8	10.13
			<hr/> 20.26

(You may keep this invoice, 7/24/11.)

Ck. 4012.

One of the best habits to cultivate is interest in your customer's wants. You do this when you sell Simon Pure Leaf Lard.

(On reverse side of above.)

Notice.

Uncanvased cured meats are not guaranteed against skippers. Canvased cured meats are guaranteed free from skippers for thirty

days from date of shipment, provided canvas is kept dry and intact.

Dry salt and Bacon side meats are not guaranteed beyond arrival in proper condition. No claims considered which are not made within ten days from date of shipment.

Positively, no goods are to be returned, without our approval. If for any reason they are not satisfactory, notify us immediately and hold subject to our order. Claims, to be considered, must be made promptly.

Fresh meats, sausage and poultry shipped at buyer's risk. Our responsibility ends when delivered to transportation company. We do not guarantee fresh meats after delivery in good order to railroad, express or steamboat company.

All laboratory products, beef extract and soda fountain supplies are delivered to transportation companies in first-class condition, after which our responsibility ceases. No claims allowed for breakage.

2854. Filed in the Office of Clerk of District Court, Cass Co., N. D. Jan. 12, 1912.

E. C. GEAREY, JR., *Clerk*,
By A. T. COMSTOCK, *Deputy*.

158

DEFENDANT'S EXHIBIT "2."

Schedule of Prices on Lard in Tin Packages.

Armour and Company.

Chicago	Kansas City	Omaha
E. St. Louis	Fort Worth	Sioux City

Dec. 1, 1910.

All Lard and Substitute in Tin Packages sold by the crate, and not by the pound.

All prices are based on tierces.

For convenience in figuring the price of any sized Tin, we have compiled a schedule, showing the value of each size per crate, at the various basis prices ranging from 6c. to 20c. per pound. The sizes are designated as Pails, Buckets and Cans.

Example:

	Cost of crates.	Per crate.
Tierce Basis Shield 12½c.	Small Pails, 20 to crate.....	\$1.10
	Medium Pails, 12 to crate.....	8.03
	Large Pails, 6 to crate.....	7.95
	Buckets, 4 to crate.....	10.30
	Cans, 1 to crate.....	6.38
	Cans, 2 to crate.....	12.75

ARMOUR AND COMPANY, U. S. A.

159 *Schedule of Prices on "Simon Pure," "Helmet," "Shield,"
"Vegetole," and "White Cloud."*

All Prices are per Crate.

Tierces, per lb.	Small pails. 20 to crate, per crate.	Medium pails. 12 to crate, per crate.	Large pails. 6 to crate, per crate.	Buckets. 4 to crate, per crate.	Cans. 1 to crate, per crate.	Cans. 2 to crate, per crate.
6	\$4.20	\$4.13	\$4.05	\$5.10	\$3.13	\$6.25
$\frac{1}{8}$	4.28	4.20	4.13	5.20	3.19	6.38
$\frac{1}{4}$	4.35	4.28	4.20	5.30	3.25	6.50
$\frac{3}{8}$	4.43	4.35	4.28	5.40	3.32	6.63
$\frac{1}{2}$	4.50	4.43	4.35	5.50	3.38	6.75
$\frac{5}{8}$	4.58	4.50	4.43	5.60	3.44	6.88
$\frac{3}{4}$	4.65	4.58	4.50	5.70	3.50	7.00
$\frac{7}{8}$	4.73	4.65	4.58	5.80	3.57	7.13
7	4.80	4.73	4.65	5.90	3.63	7.25
$\frac{1}{8}$	4.88	4.80	4.73	6.00	3.69	7.38
$\frac{1}{4}$	4.95	4.88	4.80	6.10	3.75	7.50
$\frac{3}{8}$	5.03	4.95	4.88	6.20	3.82	7.63
$\frac{1}{2}$	5.10	5.03	4.95	6.30	3.88	7.75
$\frac{5}{8}$	5.18	5.10	5.03	6.40	3.94	7.88
$\frac{3}{4}$	5.25	5.18	5.10	6.50	4.00	8.00
$\frac{7}{8}$	5.33	5.25	5.18	6.60	4.07	8.13
8	5.40	5.33	5.25	6.70	4.13	8.25
$\frac{1}{8}$	5.48	5.40	5.33	6.80	4.19	8.38
$\frac{1}{4}$	5.55	5.48	5.40	6.90	4.25	8.50
$\frac{3}{8}$	5.63	5.55	5.48	7.00	4.32	8.63
$\frac{1}{2}$	5.70	5.63	5.55	7.10	4.38	8.75
$\frac{5}{8}$	5.78	5.70	5.63	7.20	4.44	8.88
$\frac{3}{4}$	5.85	5.78	5.70	7.30	4.50	9.00
$\frac{7}{8}$	5.93	5.85	5.78	7.40	4.57	9.13
9	6.00	5.93	5.85	7.50	4.63	9.25
$\frac{1}{8}$	6.08	6.00	5.93	7.60	4.69	9.38
$\frac{1}{4}$	6.15	6.08	6.00	7.70	4.75	9.50
$\frac{3}{8}$	6.23	6.15	6.08	7.80	4.82	9.63
$\frac{1}{2}$	6.30	6.23	6.15	7.90	4.88	9.75
$\frac{5}{8}$	6.38	6.30	6.23	8.00	4.94	9.88
$\frac{3}{4}$	6.45	6.38	6.30	8.10	5.00	10.00
$\frac{7}{8}$	6.53	6.45	6.38	8.20	5.07	10.13
10	6.60	6.53	6.45	8.30	5.13	10.25
$\frac{1}{8}$	6.68	6.60	6.53	8.40	5.19	10.38
$\frac{1}{4}$	6.75	6.68	6.60	8.50	5.25	10.50
$\frac{3}{8}$	6.83	6.75	6.68	8.60	5.32	10.63
$\frac{1}{2}$	6.90	6.83	6.75	8.70	5.38	10.75
$\frac{5}{8}$	6.98	6.90	6.83	8.80	5.44	10.88
$\frac{3}{4}$	7.05	6.98	6.90	8.90	5.50	11.00
$\frac{7}{8}$	7.13	7.05	6.98	9.00	5.57	11.13

160 *Schedule of Prices on "Simon Pure," "Helmet," "Shield,"
"Vegetole," and "White Cloud."*

All Prices are per Crate.

Tierces, per lb.	Small pails. 20 to crate, per crate.	Medium pails. 12 to crate, per crate.	Large pails. 6 to crate, per crate.	Buckets. 4 to crate, per crate.	Cans. 1 to crate, per crate.	Cans. 2 to crate, per crate.
11	\$7.20	\$7.13	\$7.05	\$9.10	\$5.63	\$11.25
$\frac{1}{8}$	7.28	7.20	7.13	9.20	5.69	11.38
$\frac{1}{4}$	7.35	7.28	7.20	9.30	5.75	11.50
$\frac{3}{8}$	7.43	7.35	7.28	9.40	5.82	11.63
$\frac{1}{2}$	7.50	7.43	7.35	9.50	5.88	11.75
$\frac{5}{8}$	7.58	7.50	7.43	9.60	5.94	11.88
$\frac{3}{4}$	7.65	7.58	7.50	9.70	6.00	12.00
$\frac{7}{8}$	7.73	7.65	7.58	9.80	6.07	12.13
12	7.80	7.73	7.65	9.90	6.13	12.25
$\frac{1}{8}$	7.88	7.80	7.73	10.00	6.19	12.38
$\frac{1}{4}$	7.95	7.88	7.80	10.10	6.25	12.50
$\frac{3}{8}$	8.03	7.95	7.88	10.20	6.32	12.63
$\frac{1}{2}$	8.10	8.03	7.95	10.30	6.38	12.75
$\frac{5}{8}$	8.18	8.10	8.03	10.40	6.44	12.88
$\frac{3}{4}$	8.25	8.18	8.10	10.50	6.50	13.00
$\frac{7}{8}$	8.33	8.25	8.18	10.60	6.57	13.13
13	8.40	8.33	8.25	10.70	6.63	13.25
$\frac{1}{8}$	8.48	8.40	8.33	10.80	6.69	13.38
$\frac{1}{4}$	8.55	8.48	8.40	10.90	6.75	13.50
$\frac{3}{8}$	8.63	8.55	8.48	11.00	6.82	13.63
$\frac{1}{2}$	8.70	8.63	8.55	11.10	6.88	13.75
$\frac{5}{8}$	8.78	8.70	8.63	11.20	6.94	13.88
$\frac{3}{4}$	8.85	8.78	8.70	11.30	7.00	14.00
$\frac{7}{8}$	8.93	8.85	8.78	11.40	7.07	14.13
14	9.00	8.93	8.85	11.50	7.13	14.25
$\frac{1}{8}$	9.08	9.00	8.93	11.60	7.19	14.38
$\frac{1}{4}$	9.15	9.08	9.00	11.70	7.25	14.50
$\frac{3}{8}$	9.23	9.15	9.08	11.80	7.32	14.63
$\frac{1}{2}$	9.30	9.23	9.15	11.90	7.38	14.75
$\frac{5}{8}$	9.38	9.30	9.23	12.00	7.44	14.88
$\frac{3}{4}$	9.45	9.38	9.30	12.10	7.50	15.00
$\frac{7}{8}$	9.53	9.45	9.38	12.20	7.57	15.13
15	9.60	9.53	9.45	12.30	7.63	15.25
$\frac{1}{8}$	9.68	9.60	9.53	12.40	7.69	15.38
$\frac{1}{4}$	9.75	9.68	9.60	12.50	7.75	15.50
$\frac{3}{8}$	9.83	9.75	9.68	12.60	7.82	15.63
$\frac{1}{2}$	9.90	9.83	9.75	12.70	7.88	15.75
$\frac{5}{8}$	9.98	9.90	9.83	12.80	7.94	15.88
$\frac{3}{4}$	10.05	9.98	9.90	12.90	8.00	16.00
$\frac{7}{8}$	10.13	10.05	9.98	13.00	8.07	16.13

161 *Schedule of Prices on "Simon Pure," "Helmet," "Shield,"
"Vegetole," and "White Cloud."*

All Prices are per Crate.

Tierces, per lb.	Small pails. 20 to crate, per crate.	Medium pails. 12 to crate, per crate.	Large pails. 6 to crate, per crate.	Buckets, 4 to crate, per crate.	Cans, 1 to crate, per crate.	Cans, 2 to crate, per crate.
16	\$10.20	\$10.13	\$10.05	\$13.10	\$8.13	\$16.25
1/8	10.28	10.20	10.13	13.20	8.19	16.38
1/4	10.35	10.28	10.20	13.30	8.25	16.50
3/8	10.43	10.35	10.28	13.40	8.32	16.63
1/2	10.50	10.43	10.35	13.50	8.38	16.75
5/8	10.58	10.50	10.43	13.60	8.44	16.88
3/4	10.65	10.58	10.50	13.70	8.50	17.00
7/8	10.73	10.65	10.58	13.80	8.57	17.13
17	10.80	10.73	10.65	13.90	8.63	17.25
1/8	10.88	10.80	10.73	14.00	8.69	17.38
1/4	10.95	10.88	10.80	14.10	8.75	17.50
3/8	11.03	10.95	10.88	14.20	8.82	17.63
1/2	11.10	11.03	10.95	14.30	8.88	17.75
5/8	11.18	11.10	11.03	14.40	8.94	17.88
3/4	11.25	11.18	11.10	14.50	9.00	18.00
7/8	11.33	11.25	11.18	14.60	9.07	18.13
18	11.40	11.33	11.25	14.70	9.13	18.25
1/8	11.48	11.40	11.33	14.80	9.19	18.38
1/4	11.55	11.48	11.40	14.90	9.25	18.50
3/8	11.63	11.55	11.48	15.00	9.32	18.63
1/2	11.70	11.63	11.55	15.10	9.38	18.75
5/8	11.78	11.70	11.63	15.20	9.44	18.88
3/4	11.85	11.78	11.70	15.30	9.50	19.00
7/8	11.93	11.85	11.78	15.40	9.57	19.13
19	12.00	11.93	11.85	15.50	9.63	19.25
1/8	12.08	12.00	11.93	15.60	9.69	19.38
1/4	12.15	12.08	12.00	15.70	9.75	19.50
3/8	12.23	12.15	12.08	15.80	9.82	19.63
1/2	12.30	12.23	12.15	15.90	9.88	19.75
5/8	12.38	12.30	12.23	16.00	9.94	19.88
3/4	12.45	12.38	12.30	16.10	10.00	20.00
7/8	12.53	12.45	12.38	16.20	10.07	20.13
20	12.60	12.53	12.45	16.30	10.13	20.25
1/8	12.68	12.60	12.53	16.40	10.19	20.38
1/4	12.75	12.68	12.60	16.50	10.25	20.50
3/8	12.83	12.75	12.68	16.60	10.32	20.63
1/2	12.90	12.83	12.75	16.70	10.38	20.75
5/8	12.98	12.90	12.83	16.80	10.44	20.88
3/4	13.05	12.98	12.90	16.90	10.50	21.00
7/8	13.13	13.05	12.98	17.00	10.57	21.13

162

630 Northern Pacific Ave.

Please remit to this address.

FARGO, N. D., 9-8, 191-.

M. E. F. Lamm—

8305.

Bought of Armour and Company.

Terms cash.

Package goods are sold weight when packed; no allowance made for natural shrinkage. Wrapped meats are sold by gross weight.

Form 560—Styles-A-Small—2 Million—1-22-12—Req. 77894.

1 Small Shld. Lard

1/20

7 05

35¢

Defendant&s Exhibit

1

Wm. C. Green

O K

T. J. Sirrs.

Armour & Company

Paid

Sep. 8, 1-11

Fargo, N. Dak.

One of the best habits to cultivate is interest in your customers' wants. You do this when you sell Simon Pure Leaf Lard.

[Endorsed:] 2854. Filed in the office of Clerk of District Court Cass Co. N. D. Jan. 12, 1912. E. C. Gearey, Jr., Clerk, by A. T. Comstock, Deputy.

* * * * *

163-165 (Thereafter and on October 31, 1912, the defendant appealed to the Supreme Court of the State of North Dakota, and said case was duly certified to said court.)

166 Now on the 3rd day of November, A. D. 1913 the said The Supreme Court of the State of North Dakota, being in regular session and duly opened called for argument the said case of the State of North Dakota, Respondent, vs. Armour & Company, Appellant.

On said argument there appeared for the defendant and appellant, Messrs. Watson & Young and Mr. Abram B. Stratton. For the State of North Dakota, the plaintiff and respondent, there appeared Hon. John Carmody and Hon. Alfred Zuger, Assistant Attorneys General.

Now the said cause was argued, submitted and by the Court taken under advisement.

167 On the 17th day of December, A. D. 1913, there was filed in this court the following order:

File No. 2503.

STATE OF NORTH DAKOTA,
In the Supreme Court, ss:

STATE OF NORTH DAKOTA, Plaintiff and Respondent,
vs.
ARMOUR & COMPANY, Defendant and Appellant.
Appeal from the District Court of Cass County.

This action coming on to be heard at the September A. D. 1913 term of this Court, at the Supreme Court room, in the City of Bismarck, State of North Dakota;

Present: Burleigh F. Spalding, Chief Justice; Charles J. Fisk, Edward T. Burke, Evan B. Goss and Andrew A. Bruce, Associate Justices, and the appeal herein having been argued by Watson & Young and Abram B. Stratton for the Appellant and by John Carmody, Assistant Attorney General for Respondent and the Court having advised thereon, it is now here considered, ordered and adjudged that the judgment of the said District Court within and for said Cass County appealed from herein, be and the same is hereby affirmed.

And it is further Ordered, That this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the order of this court.

Dated December 17, 1913.

By the Court.

B. F. SPALDING,
Chief Justice.

[Seal Supreme Court, State of North Dakota.]

Attest:

R. D. HOSKINS, *Clerk.*

168 On the 17th day of December, A. D. 1913, there was filed in this Court the following opinion:

Title.

Beginning with Chapter 72 S. L. 1899, North Dakota has each year enacted legislation upon the subject of pure foods and honest weights and measures. The 1907 Act provides that every package, bottle or container should bear the true net weight of the product. Chapter 236 S. L. 1911 provides that every article of food or beverage as defined in the statutes of this state shall be sold by weight, measure or numerical count and labeled in accordance with the provisions of the laws of this state; that all weights shall be net, excluding the wrapper or container, and that every lot of lard, lard compound or lard substitute unless sold in bulk shall

be put up in pails or containers holding one, three or five
169 pounds net weight or some whole multiple of these numbers
and not any fraction thereof. Defendant is a corporation
having packing houses in Chicago, Omaha and other large cities,
and maintaining a branch establishment in the City of Fargo, N. D.,
to which its goods are shipped in carload lots to be distributed
therefrom. In October, 1911, the State Food Commissioner went
to this branch establishment in Fargo and asked to purchase three
pounds of lard. He was sold a pail containing two pounds and six
ounces. The sale and the resultant arrest were made to test the
constitutionality of the 1911 law. The defendant claimed that the
law was unconstitutional for seven reasons, the first reason being
subdivided into six parts.

(1) Plaintiff's contention is that the law is unconstitutional be-
cause it is arbitrary, unreasonable and not justified under the police
powers of the state. (a) It is contended that the 1911 law was
unnecessary because the 1907 law providing for the display of net
weights was ample to protect the consumer against fraud. Held,
that the legislature has primarily the choice of laws regulating
weights and the court will not interfere with this choice. The
burden is upon the person attacking the constitutionality of the
law to show beyond a reasonable doubt that the constitution
170 has been violated, that in the case at bar the defendant has
failed in his proof and on the contrary, by its own evidence,
has shown that the law was being artfully evaded, thus furnishing
abundant reason for the 1911 enactment. (b) It is contended that
the law is unreasonable because it interferes with a custom of the
lard industry extending over a period of more than thirty years.
Held, that this is no objection to the law. The fact that an abuse
has existed for thirty years does not foreclose the state from an
attempt to regulate the same. (c) It is contended that the law is
unreasonable because it imposes an additional expense upon the
packers. Held, upon an examination of the evidence, that this con-
tention is not well founded. The defendant is already supplying
a private firm with net weight pails that would comply with the
laws of North Dakota. No reason is shown why those pails could
not be lithographed with the Armour brand and used in North
Dakota. (d) It is further urged that the law is unnecessary and
unreasonable because in any event the customers are not prejudiced.
That they are paying merely the price of bulk lard plus the extra
expense of the tin pails. Held, upon an examination of the evi-
dence, that the consumer pays much more than the mere cost of
the container. This cost includes expensive advertising upon
171 the pail itself and a probable profit to the middlemen upon
the cost of the pail as well as of the lard. (e) It is urged
that the law is unreasonable as interfering with the regular custom of
all trades, it being contended that butchers and grocers include the
weight of one paper bag with the goods sold. Held, that even if true
it furnishes no reason why laws should not be enacted to regulate
this abuse. (f) It is contended that the enforcement of this law
will drive the packers to use bulk lard only, to the detriment of

the commodity. Held, that from the evidence, the packers never furnished over 40% of the lard to the trade in this state and this defendant furnishes but between 5% and 10% of the lard used, and even should it withdraw from the state it would not materially affect the lard industry. The authorities upon the subject of the control of weights and measures by compelling even weights in containers are collected in the opinion.

(2) The law of 1911 does not interfere with the guaranties of the constitution relative to the right of freedom of contract and the equal protection of the law. Under the police power, the state can interfere with private rights when necessary to protect the public from fraud or the opportunity for fraud. Whatever injury one particular citizen may suffer is compensated to him by the general protection afforded him against other evils, by such police power.

172 (3) Said statute does not constitute the taking of property without due process of law.

(4) The claim of appellant that the lard industry is singled out from all articles of food and subjected to regulation is not supported by the evidence in this case. Every article of food or beverage as well as ordinary articles of commerce such as paints, formaldehyde, Paris Green, etc., are regulated by the same or similar acts. The 1911 law specifically mentions lard, lard compounds, and lard substitutes and the manner of their regulation in pails, but this is a mere incident of the law. The object of the law is to prevent the opportunity for fraud in the sale of all articles of food.

(5) The claim of the defendant that the law is in violation of the commerce clause of the federal constitution is not sustained. Congress has control of commerce between the several states, with foreign nations and among the Indian tribes, while the states have control over intra-state commerce. The pail of lard sold to the Food Commissioner was shipped into the state in a railway car and was itself contained in a crate containing twenty similar pails. The original package was either the railway car or the crate and had been broken prior to the sale. Thus the sale was a local or intra-state transaction. The cases upon this phase are collected in the opinion.

173 (6) It is contended by defendant that the act should be given a reasonable interpretation, thus permitting the sale of short or gross weight pails if labeled with the net weight. Held, that the import of the law is plain and that the construction required by the defendant would result in a repeal of the law by judicial construction which this court will not do.

(7) It is contended that congress has assumed control of the field of pure foods and weights and therefore the laws of North Dakota upon the subject have become ineffectual. Under the fifth paragraph of this opinion it is held that the sale in question was an intra-state transaction entirely within the control of the state and entirely outside of the control of the United States.

Upon consideration of the whole act it is held that the law is reasonable and necessary and it in no manner prejudiced the

defendant and is not in conflict with any of the enumerated provisions of the constitution.

(Syllabus by the Court.)

Appealed from the District Court of Cass County, Pollock, J.

Affirmed.

Arthur W. Fowler, of Fargo, N. D., and Andrew Miller, Attorney General, Alfred Zuger, Assistant Attorney General and John Carmody, Assistant Attorney General, of Bismarek, N. D., (Edward Engerud, of Fargo, N. D., of Counsel), Attorneys for Re-
174 spendent.

Watson & Young, of Fargo, N. D., and Alfred R. Urion, of Chicago, Ill., and Abram B. Stratton, of Chicago, Ill., Attorneys for Defendant and Appellant.

Opinion of the Court by Burke, J.

BURKE J.: Beginning with Chapter 72, Session Laws of 1899, the legislature of the State of North Dakota enacted various laws relative to pure foods and honest weights. This legislation covers almost every article of food; beverages, Paris Green, paints, formaldehyde, and other articles too numerous to mention. The weight of a bushel of every kind of grain is specified, as well as the size of a gallon, quart, pint, etc., in liquids. The sheriffs of the various counties are given authority to examine and test scales and measures and confiscate those found to be false. Among other subjects regulated is lard. In 1905 an act was passed providing that all articles of food should be considered misbranded if the package, bottle or container did not bear the true net weight, name of the real manufacturer or jobber, and the true grade or class of the product, the same to be expressed in clear and distinct English words in black type on a white background. In 1907 this act was re-
enacted with a few changes, to read as follows: "If every
175 package, bottle or container does not bear the true net weight, the name of the real manufacturers or jobbers, and the true grade or class of the produce, the same to be expressed on the face of the principal label in clear, distinct English words, in black type, on a white background, said type to be in size uniform with that used to name the brand or producer," the same is to be considered misbranded, etc. This article applied to all food products as well as lard.

Chapter 236 S. L., 1911 reads as follows: "Every article of food or beverage as defined in the statutes of this state shall be sold by weight, measure or numerical count and as now generally recognized by trade custom, and shall be labeled in accordance with provisions of the food and beverage laws of this state. Only those products shall be sold by numerical count which cannot well be sold by weight or measure. All weights shall be net, excluding the

wrapper or container, and shall be stated in terms of pounds, ounces and grains, Avoirdupois weight, and all measures shall be in terms of gallons of two hundred thirty-one cubic inches or fraction thereof, as quarts, pints and ounces. Reasonable variations shall be submitted and tolerations therefore shall be established and promulgated by the food commissioner. Every lot of lard or of lard compound or of lard substitute, unless sold in bulk shall be

176 put up in pails or containers holding one, three or five pounds, net weight, or some whole multiple of these numbers, and not any fraction thereof. If the container be found deficient in weight, additional lard compound or substitute shall be furnished to the purchaser to make up the legal weight. The face label shall show the true name and grade of the product, the true net weight, together with the true name and address of the producer or jobber. If other than leaf lard is used then the label shall show the kind as 'back lard' or 'intestinal lard.' Every lard substitute or lard compound shall also show in a manner to be prescribed by the food commissioner, the ingredients of which it is composed, and each and every article shall be in conformity with, and further labeled in accordance with the requirements under the food laws of this state. A loaf of bread shall be two pounds in weight. Bread, unless composed in chief parts of rye or maize, shall be sold only in whole, half and quarter loaves and not otherwise. Bread, when sold, shall upon the request of the buyer, be weighed in his presence and if found deficient in weight additional bread shall be delivered to make up the legal weight, except that this shall not apply to rolls or to fancy bread weighing less than one quarter of a pound, provided every loaf, half loaf, quarter loaf, or other loaf of bread which does not weigh the full legal weight required

177 by this section when plainly labeled with the exact weight thereof, shall not be deemed in violation of the provisions of this act."

The defendant is a corporation with packing houses in Chicago, Kansas City, Omaha and other larger cities, doing a large business in the various lines incident to the packing trade. They maintain a branch establishment in the City of Fargo in this state in charge of a general manager. In October, 1911, Professor Ladd, State Food Commissioner, went to this establishment and asked to purchase three pounds of Armour's Shield Lard. He was sold a pail which is one of the exhibits in this case and which admittedly contained two pounds, six ounces of lard. Upon complaint of the food commissioner arrest was made under the provisions of the 1911 law. The purchase was made and the complaint made with the direct object of testing the constitutionality of the law. This is emphasized in the briefs of both parties, and in view of the importance of the subject we will disregard any question other than the constitutionality of said act of 1911. The defendant admits the sale within the state of a single pail of lard, which sale was a violation of the 1911 law, but urges that the law is unconstitutional and void in so far as it attempts to regulate the size of the pail, for six reasons given

in the appellant's brief in the following language: "Our
178 contentions still are, and we urge them with all confidence.

(1) That this law is arbitrary and unreasonable and cannot be justified under the police power of the state. (2) That it interferes with the guaranties of the right of freedom of contract and of the equal protection of the law afforded by the constitution. (3) That it constitutes the taking of property without due process of law. (4) That it is class legislation. (5) That it is in violation of the commerce clause of the federal constitution and (6) that in no event under proper construction of the statute can a conviction be sustained." We will discuss these objections in the order named.

(1) The first contention is that the law is arbitrary, unreasonable and not justified under the police power of the state. Thereunder appellant has advanced six arguments and we will therefore subdivide this first subject and discuss each of the reasons given under the designation of a letter of the alphabet. Before taking up those matters in detail a few general remarks may be useful. The lard sold in this instance was not adulterated or misbranded, but the general principles are identical. The questions of pure food and honest weights are inseparably allied and any argument advanced upon one, applies equally to the other. That the subject is well within
the police power of the state is so well settled that it seems a

179 waste of time to cite authorities at length, and we will therefore content ourselves with a few citations upon this general proposition. In the excellent work of Thornton on Pure Food and Drugs, section 3, we find: "At this day and age it seems scarcely necessary to cite the ground upon which pure food legislation rests, nor to cite cases in support of it. The right * * * rests upon the police power of the state which remains unimpaired by the federal constitution. * * * It has not only the right, but it is a duty and obligation which the sovereign power owes to the public, and as no one can foresee the emergency or necessity which may call for its exercise it is not an easy matter to prescribe the precise limits within which it may be exercised. * * * (Section 4). For it is a settled doctrine of the courts that as government is organized for the purpose, among others, of preserving the public health, and the public morals, it can not divest itself of the power to provide for those objects, and that the Fourteenth Amendment was not designated to interfere with the exercise of that power by the States."

The same author speaking of the power of the legislature and the courts at section four says: "It is not a part of their (the courts) function to conduct investigations of fact entering into questions of

public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove the determination of such questions.

180 The power which the Legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both the power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty and property, * * * yet in many cases of mere administration the re-

sponsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage." Quoting from *Lick Company v. Hopkins*, 118 U. S., 370, 30 L. Ed. 226. In *Powell v. Commonwealth*, 127 U. S. 678, 32 L. Ed. 253, (affirming 114 Penn. 265, 7 Atl. 913, 60 Am. Rep. 350, 5 Cent. Rep. 890) it is said: "If all that can be said of this legislation is that it is unwise or unusually oppressive to those manufacturing * * * an article of food, their appeal must be to the legislature or to the ballot box, not to the judiciary. The latter can not interfere without usurping powers committed to another department of the government. See also:

- 181 *McCray v. United States*, 195 U. S. 27, 49 L. Ed. 78.
Walker v. Pennsylvania, 127 U. S. 699, 3 L. Ed. 261.
State v. Schlenker, 112 Ia. 645, 84 N. W. 699, 51 L. R. A. 347.
St. Louis v. Schuler, 190 Mo. 524, 89 S. W. 621, 1 L. R. A. (N. S.) 928.
State v. Layton, 160 Mo. 474, 61 S. W. 171, 62 L. R. A. 163.
State v. Sherod, 80 Minn. 446, 83 N. W. 417, 50 L. R. A. 660, 81 Am. St. 268.
Commonwealth v. Evans, 132 Mass. 11.
People v. Smith, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759.
Commonwealth v. Waite, 87 Am. Dec. 711.
Stolz v. Thompson, 44 Minn. 271, 46 N. W. 410.

From *State v. Smith*, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759, we quote: "When a subject is within that (the police) power, the extent to which it shall be exercised, and the regulations to effect the desired end, are generally wholly in the discretion of the Legislature."

- State v. Mrozinski*, 59 Minn. 465, 61 N. W. 560, 27 L. R. A. 76.
Helena v. Dwyer, 64 Ark. 424, 42 S. W. 1071, 30 L. R. A. 266, 62 Am. St. 206.
Borden's Condensed Milk Co. v. Montclair, (N. J. L.) 80 Atl. 30.
Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643.
Valentine v. Englewood, 76 N. J. L. 509, 71 Atl. 344, 19 L. R. A. (N. S.) 262.
Reduction Co. v. Sanitary Works, 199 U. S. 306, 50 L. Ed. 204.
Gardner v. Michigan, 199 U. S. 325, 27 L. Ed. 1107.
Laurel Hill Cemetery Co. v. San Francisco, 216 U. S. 358, 54 L. Ed.
Atlantic City v. Abbott, 73 N. J. L. 381, 62 Atl. 999.

- 182 The rights of the courts are thus set forth by the supreme court of Missouri, in *St. Louis v. Liessing*, 190 Mo. 464, 89 S. W. 611, 109 Am. St. 774. "If the article is universally conceded

to be so wholesome and innocuous that the court may take judicial notice of it, the legislature under the constitution has no right to absolutely prohibit it; but if there is a dispute as to the fact of its unwholesomeness for food or drink, then the legislature can either regulate or prohibit it. The constitutionality of the law is not to be determined upon a question of fact in each case, but the courts determine for themselves upon the fundamental principles of our constitution that the act of the legislature or municipal assembly is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt." See also *State v. Layton*, 160 Mo. 468, 61 S. W. 171, 62 L. R. A. 163, 83 Am. St. 487; also *Adams v. Milwaukee*, 144 Wis. 371, 129 N. W. 518. From *Powell v. Commonwealth*, 114 Penn. 265, *supra*, we quote: "If there be a doubt upon the question, then the court can not substitute its opinion for that of the legislature. In such an instance the opinion of the legislature must be considered right and binding." See also *Rigbers v. Atlanta*, 7 Ga. App. 411; *Borden v. Montclair*, (N. J. L.) 80 Atl. 30.

183 Keeping in mind then the extraordinary burdens of proof placed upon the defendant in this case in its attack upon this statute, we approach the facts in this case. As early as 1899 the legislature of this state provided for a Food Commissioner and enacted pure food laws. Every session of the legislature since that time has contributed further legislation upon the subject. For nearly fifteen years Professor Ladd has been such Pure Food Commissioner and the Agricultural College of this state has maintained a department for the testing of foods and weights and often has had men traveling over the state making purchases and studying the subject of pure foods and honest weights and measures in a scientific and painstaking manner. The 1911 law was drafted by Professor Ladd after twelve years of observation and study. He is one of the recognized authorities of the United States and his opinion upon this subject might alone be enough to create a doubt of the proposition advanced by the defendant that there is no necessity for the law. The expert who drafted the law, the legislature who passed it and the Governor who approved it, all thought necessity existed for such a measure. If we did not agree with all of those, we might well hesitate to say that there was absolutely no doubt upon the question, but in fact

a majority of this court believes the law not only reasonable, 184 but necessary, and this belief is founded upon the evidence in this case and upon facts of which this court can take judicial cognizance. We will now discuss in order the subdivisions of appellant's first objection to the law.

(a) Appellant contends that Chapter 195 S. L. 1911 was amply sufficient to protect the commerce of the state against fraud and that there was no necessity for the 1911 legislation and the same law was a re-enactment of the 1905 law with a few amendments and its text will be found earlier in this opinion. It provided that the net weight should be placed upon each package of food. The legislature was not confined to this remedy. They might repeal it and provide further regulations if they so chose. They had

as much right under the police power to require even weights as they had to require the net weight to be printed upon the outside of the pail. This court has no right to interfere with legislation and say that one measure is superior to the other. During the last dozen years there has been a decided tendency of manufacturers to pack foods in cans and packages. Improved machinery and improved sanitary conditions have enabled foods to be packed cheaply and safely, therefore conditions have *enabled foods to be packed cheaply and safely, therefore conditions have* been changing year by year and legislation necessarily must change to meet them. The

185 object of all net weight and measure laws is to prevent the opportunity for fraud. See Freund on Police power, Sec. 274; Tiedeman on Police Power, section 89; People v. Wagner, 49 N. W. 609; McLean v. Ark., 211 U. S. It is not material whether the defendant in this case was guilty of fraud in the sale of this particular pail of lard, but was the manner of the preparation of the pail such that the people generally might be defrauded? The consumers do not have to depend upon the honesty of the manufacturer in every case. They are entitled to laws allowing them to ascertain the facts themselves. Although, a large majority of the manufacturers are giving honest weights and honest measures, there are frauds in measures and weights, as can be readily ascertained from an examination of the records of the Pure Food Commissioner of North Dakota and those of Dr. Wiley, formerly of the National Pure Food Bureau. The honest manufacturers as well as the consumers are entitled to protection from competition with dishonest weights. There was therefore a necessity for some sort of *isla-*tion upon this subject in this state. Taking up in particular the lard industry we find from the evidence in this case that the packers as a whole supply but 40% of the lard used in this state, while

186 60% is supplied by local butchers and the consumers themselves. Defendant has one of the largest of the packing houses, but does not of course supply more than its share of the trade dividing with such houses as Swift & Company, Cudahy & Company, and Morris & Company at least. It is apparent therefore that they represent something less than 10% of the lard industry and if they have obeyed the law of 1907 (which we do not concede) it would not be proof that the other 90% of the industry had likewise obeyed the law. Besides, the defendant sells only to the middleman and there is no proof that the middlemen who purchased from defendant were obeying the 1907 law. It is thus apparent that the behaviour of the defendant has but a remote bearing upon the necessity for the 1911 regulation. Nor should the fact that the defendant was obeying the 1907 law at the time of the arrest be any proof that it was obeying it at the time of the passage of the 1911 law. In other words, the law was enacted for the protection of the consumer and the conduct of defendant in one sale is only slightly material on the general condition. Approaching still closer to the case in hand we inquire whether or not the defendant was obeying the 1907 law. We discuss this with reluctance, because the defendant is undoubtedly following the trend of the

trade of the general packers and it is not in justice to be singled out from the others. Unquestionably, defendant makes a fine grade of lard and much may be said in its favor from a trade standpoint. However, it has forced this argument upon us and we would be remiss in our duty did we not answer it with candor. When Professor Ladd purchased the pail of lard in evidence it bore upon its side a lithographed label in five colors bearing the advertisement of the lard. The words "Armour's Pure Lard" are printed upon this label in letters over a quarter of an inch in height and covering six and three quarters of an inch in length, while the name "Shield" covers four running inches and the small letters stand three-eighths of an inch in height and the capitals larger, but upon this label there is no net weight as required by the 1907 law (which see) but upon the left and rear of the pail completely out of sight as it would stand upon a shelf, we find a paper tag about the size of a silver half dollar and placed thereon in aniline ink evidently with a rubber stamp the words "Net weight, 2 lbs., 6 oz." in letters about one-eighth of an inch in height and covering three-quarters of an inch in length. The wording upon the paper label is scarcely 10% in size of that used in giving the name of the kind of lard. This disk of paper is stuck on the smooth surface of the pail with paste and as those pails are to be shipped in refrigerator cars and are usually kept in a cool place in summer, the label is about as liable to come off as it is to stay on. The ink upon this particular label has faded away, although the pail in evidence has been kept in the dark vaults of the Cass County court house and of this court until now it is not legible to the naked eye. When exposed to the light in the stores of the middlemen it would undoubtedly fade more rapidly. It is hard to avoid the conclusion that the defendant company prepared those tags to give the least notice possible to the consumer and yet make a showing of complying with the 1907 law. In the face of this showing alone the legislature was amply justified in passing the 1911 act. If it be claimed that this paper tag was a temporary affair to be used until pails could be manufactured showing the net weight upon the principal label in a permanent form we have merely to turn to the evidence of Mr. Howe, General Manager of the Chicago house, where he testifies that those tags had been in use for about six years at the time of the trial and that they were in use ever since the first Pure Food laws were enacted. It evidently was not the intention of this defendant to use any other designation upon their pails or they would have done so, as they were making thousands of pails every day.

With this conduct of the packers well known to the Food Commissioner and Legislature of this state, it was only natural that an effort be made to secure better laws upon the subject. People had been educated to call those one-three-five and ten pound pails, as appears from the testimony of the defendant. Indeed, Exhibit "B" in this case is a bill from Armour & Company to the Aneta Mercantile Company of Aneta, N. D., in which those pails were so designated by the defendant company itself. The

purchaser was not able readily to extract the lard from the pail and weigh it. The lard was used from the pail itself in small portions and the fact that the pail was included in the gross weight might not ordinarily occur to the housewife. The contention of the defendant that it had complied with the 1907 law is unsupported by the evidence.

(b) Defendant further claims the law to be unreasonable, because it had been its custom and the custom of the other packers for over twenty years to use gross weight pails and that it had therefor- become a settled right of the trade. We do not believe this argument sound. The pails have been in use less than thirty years while the lard industry has existed for many hundreds of years. Questions like this are not settled in a day, nor in thirty years. No reason is given why short weight pails were used in the beginning. Gross weight is unfair, always has been unfair and always will be unfair. Net weight is fair and just and should eventually predominate. It is hard to believe that the selection of short weight pails thirty years ago was not an attempt to deceive somebody. Can it be possible that a thirty years' tolerance of an evil forever thereafter forecloses mankind from seeking a remedy? It may be that North Dakota now stands alone in this particular law; twelve years ago it stood alone or almost alone, upon the entire subject of pure food regulations. Today there is scarcely a state in the union that has not such legislation. Public opinion has forced this legislation and it will force the net weight legislation. Net weight pails may be the rule and not the exception in a very few years. While it is just that the consumer pay for the container it is equally just that he should know how much container he was purchasing and how much lard.

(c) Defendant next contends that the law is unreasonable, because it imposes an additional expense upon the packers in that they must furnish a different sized pail for North Dakota than is supplied to the rest of the states. Much evidence was introduced upon this point, but it does not appeal to us for two reasons. (1) There is no reason for furnishing other states with short weight pails, and (2) the evidence in this case shows that the defendant could comply with the North Dakota law with little or no expense. Mr. Nichols, superintendent of the defendant's tin shops, was one of the witnesses and upon cross examination admitted that the firm of Park & Tilford of New York City had insisted upon receiving net weight pails and was being supplied with the same by Armour & Company during all the time of this litigation. He says: "Q. And you make net weight pails for them now? A. Yes, sir. We make and fill them. * * * Q. For how long? A. I don't know, I am sure; a few years." It further appears that those pails were made in the shops of the defendant and that they had full machinery for making the net weight pails and could have made a few more for a North Dakota trade. To be true, the pails made for Park & Tilford are of a slightly different shape than those used under Armour name and contain Park & Tilford's name upon the label. But we see no reason why the Armour label could not have

been placed upon some of those pails for use in North Dakota. A supply of empty pails could be kept at each packing establishment and filled for the North Dakota trade as the orders were received. At any event it would be no more expensive to furnish the sovereign state of North Dakota with those pails, than it was to supply a private firm. There is no argument advanced showing extra expense in one case that would not occur in the other. That mail order houses may supply North Dakota patrons with gross weight pails is immaterial. The mail order houses are protected under the provisions of the interstate commerce clause. Our law only applies to sales made within the state of North Dakota.

(d) It is next urged that the law is unreasonable, because in any event the consumers are not prejudiced. That they are paying merely the price of tierce lard plus the extra expense of the tin pails, the handling of the lard in such small quantities, and packing the same. We think this argument fails and again for two reasons: (1) The defendant does not sell to the consumer but to middlemen. Conceding that defendant charges the middlemen merely for the actual cost of pails, we know that the middlemen would expect a profit upon his entire investment, and therefore the consumer would have to pay not the net cost of the container, but the middlemen's profit thereon as well. In Exhibit "B" defendant sold to the Aneta Mercantile Company one case of three pound pails. The case contained twenty pails and the Mercantile Company was charged for sixty pounds of lard at sixteen and seven-eighths cents a pound, or \$10.13. When the Mercantile Company placed these pails upon the counter for sale they naturally added a profit upon the whole amount invested. They had purchased forty-seven and one-half pounds of lard and twelve and one-half pounds of tin and had paid sixteen and seven-eighths cents a pound for the whole. When they sold the same the purchaser would be obliged to pay for the lard with the profit thereon to the Mercantile Company and for the pail with the same profit to the Mercantile Company, and while Armour & Company might have made nothing upon the pail, yet the customer paid a profit. (2) An analysis of the evidence shows that the defendant company gets something besides the net cost of his pail. The plain pail costs little, but the defendant, seeing an opportunity of a lasting advertisement, has taken advantage of the consumer to advertise his goods at the housewife's expense. Mr. Nichols explaining the manner of the preparation of the pails, says: "They are electro-type plates made of compound, compound filled with electro-type material. * * * There are four operations before it is discharged from the machine. First, the machine changes the tin, puts on one color; revolves, puts on another color, and so on till it gets five colors on, then it discharges it. * * * We have a lithographing press to do the lithographing and lacquering of the bodies, and we have a coating machine. Now, each of those machines has an oven. After it is lithographed and the lacquer, that is the front of the lard can, there—the label is put on and lacquer around the label, it has to go into an oven with 318 degrees or 330 degrees heat, stay in four or five hours according to the atmosphere,

sometimes six." The manager of the company testifies that
194 the company gets the benefit of the lasting advertisement free.

Analysis of the testimony therefore shows that Armour & Company is charging the expense of the advertising of their general business up to the lard industry. When a twenty pound pail of lard is sold it contains eighteen pounds of lard and two pounds of pail. If the consumer pays twenty-five cents a pound, he has paid fifty cents for the pail and \$4.50 for the lard. This pail has cost the defendant around four cents for tin and a few cents for the making of the pail, which is done by machinery and very cheaply, and the rest of the charge must be for incidental expenses, including the lithographing, and nobody knows the items thereof. The consumer is entitled to this information and the 1911 law helps to supply it. The policy of all such laws is to make it easy for the purchaser to calculate the price that he is paying for the lard and to detect fraud. As we have said before, it is not a question so much of the intention of one particular packer, but a question of opportunity for fraud. It is hard to conceive of any system offering more opportunities for fraud than the gross weight system. If some dishonest packer should decide that the present pail was too light to stand the strain of commerce and should double the weight of his pail, the housewife would pay lard prices for tin and honest packers would find
195 themselves competing with the rascal who was making a 25% profit to which he was not entitled.

(e) It is next urged that the law is unreasonable in that other traders have been using gross weight methods also. For instance, they claim that butchers weigh the paper along with the meat and charge meat prices for the paper. To this we have only to say that if the statement is true, the butcher is dishonest in charging twenty-five cents a pound for paper that cost him less than a cent a pound. However this would not help the defendant. The fact that the butcher may be dishonest in his business does not aid dishonest methods in other lines, nor render unreasonable laws to regulate them.

(f) The defendant urges that the enforcement of this law will drive the packers to use bulk lard only and that this is unsanitary. This is not in point. The packers have never supplied more than 40% of the trade of this state. During the past two years the packers have withdrawn from this state with their pails and there is no sign of any great damage to the state. Net weight pails are on sale in almost every store in the state. In this city a local establishment has complied with the law and is furnishing the trade with net weight pails at the present time. We do not believe the packers will abandon North Dakota nor that it would ruin the state if they did.

196 The National Biscuit Company has quietly returned to this field and is selling net weight biscuits at the regular places after a similar threat and a short absence.

Thus upon complete analysis we find that the 1911 law is reasonable and necessary and not arbitrary or capricious; that it has supplied a necessary piece of legislation and that it has worked no hardship upon the defendant in this case.

We think that we have given reasons enough to sustain our position without reference to the decisions of other states, but upon an examination of all the authorities upon statutes in any way similar we find our position sustained by a large majority of the decisions. True, no state has a law exactly like our net weight lard law, but other states have regulated similar articles, bread, corn meal, tobacco, molasses, etc., generally. We review a few of those cases. The state of Tennessee enacted a law requiring corn meal to be put up in sacks containing two bushels, one bushel, one-half bushel, one-quarter bushel, or one-eighth bushel respectively, and made it unlawful to pack for sale, or sell, or offer for sale any corn meal in bags of other weights. This is almost identical in principle with the case at bar. This is a well considered case collecting almost all of the authorities. Therefrom we quote: "Legislation for the prevention of fraud in

weights and measures, especially in the sale of food and other essentials of life was early enacted in England and is common in all the states. * * * It simply provides that when a certain staple article of food, of universal consumption in this country, is sold in packages, the packages shall contain certain quantities of the article, and that the quality and quantity * * * shall be printed and marked thereon. It is well known that corn meal is generally sold by the bushel, or the fraction of a bushel, and is put in packages purporting to contain such quantities, and the object of the statute is to prevent the giving of short weights in these packages, and the consumers from thus being deceived and defrauded, it is true of small sums, but which on account of the enormous sales, in the opinion of the legislative department is a public evil which should be suppressed. It in no sense deprives the owner of his property, of the power to sell and dispose of it in a fair and honest manner. Nor is the act when properly construed discriminatory. It does not prohibit the manufacturer, the wholesaler, or any person from selling meal in any bag or other receptacle, or quantity, desired by the seller or consumer, when priced and delivered by actual weight or measure. All persons, whether retailers or not, may sell it in that way. That statute only applied where it is put in bags or packages for sale, and sold or offered for sale without being weighed or measured.'

198 For the benefit of persons who have not access to this (Tennessee) case we repeat the authority.

State v. Co-operative Store Co., 123 Tenn. 399, 131 S. W. 867, A. & E. Ann. Cases, volume 24, page 248.

People v. Luhrs, 195 N. Y. 377, 89 N. E. 171, 25 L. R. A. (N. S.) 473.

People v. Giard, 145 N. Y. 105, 39 N. E. 823, 45 Am. St. Rep. 595.

People v. Wagner, 86 Mich. 594, 49 N. W. 13 L. R. A. 286, 24 Am. St. Rep. 141.

Squire v. Tellier, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 323.

State v. Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419.

- Neas v. Borches, 109 Tenn. 398, 71 S. W. 50, 97 Am. St. Rep. 419.
 Lemieux v. Young, 211 U. S. 489, 53 U. S. (L. Ed.) 295.
 State v. Fourcade, 45 La. Ann. 717, 13 So. 187, 40 Am. St. Rep. 249.
 Butler v. Chambers, 36 Minn. 69, 30 N. W. 308, 1 Am. St. Rep. 638.
 Waterbury v. Newton, 50 N. J. L. 534, 14 Atl. 604.
 Freund on Police Power, section 275.

We also believe the bread cases, as they are called, are an authority upon this proposition. We will not lengthen this opinion by extracts from those cases, but it is sufficient to say that there is not much difference in principle between regulating the weight of a loaf of bread and the contents of a pail of lard. Below is a list of those cases:

- Commonwealth v. McArthur, (Mass.) 25 N. E. 836.
 Mayor v. Yuille, 3 Ala. 137.
 199 People v. Wagner, (Mich.) 49 N. W. 609, 13 L. R. A. 286.
 City of Chicago v. Schmidinger, (Ill.) 90 N. E. 369.
 State v. McCool, 83 Kans., 428; Ill. Pac. 477.
 State v. Creamery Co., 93 Kans. 389; Ill. Pac. 474.

Also in point, as we think, are the coal cases and particularly MeLean v. State, 98 S. W. 729, in which the supreme court of Arkansas sustained a law having many features similar to our statute. Upon appeal to the Supreme Court of the United States this case was in all things affirmed. See 211 U. S. 539. We find an excellent *increase* upon this subject by the highest court of this land, from which we give a short quotation as it is a very recent case and practically overrules Milet v. People, 117 Ill. 294, which is practically the only case relied upon by the appellants: "Liberty of contract which is protected against hostile state legislation is not universal, but is subject to legislative restrictions in the exercise of the police power of the state. * * * The legislature of the state is primarily the judge of the necessity of exercising the police power and courts will only interfere in case the act exceeds legislative authority; the fact that the court doubts its wisdom or propriety affords no ground for declaring a law unconstitutional or invalid." Also more or less in

point, we think, are the shingle cases, cleomargarine cases, 200 tobacco cases, and others too numerous to mention, but which may be found in a note to the Tennessee cases where the same is reported in Am. & Eng. Ann. Cases, Volume 24, (1912 C) at page 251, and running to page 259. The text writer gives a list of the statutes which as he said: "Intend to prevent fraud by prohibiting arbitrary deductions by buyers from the gross weight of particular quantities, has been held to be within the police power of the state and not to interfere unlawfully with the freedom of contract." Further authorities might be given but space forbids.

(2) Taking up the second objection, the defendant claims the law unconstitutional because it interferes with the guaranties of the right

of freedom of contract and of the equal protection of the law afforded by the constitution. This contention has been made so often, and been so often overruled, that we will give it but the merest mention. We quote from *Deems v. Baltimore*, 80 Md. —; 30 Atl. 648, 26 L. R. A. 541, as follows: "To justify such interference with private rights, the exercise must have for its immediate object the promotion of the public good, and so far as may be practicable, every effort should be made to reconcile the conflicting rights of the public and the private rights of individuals, at the same time the emergency

may be so great and the danger to be averted so eminent, that private rights must yield to the safety of the public. And to await in such cases the delay necessarily incident to ordinary judicial inquiry in the determination of private rights would defeat all together the object and purpose for which the exercise of this salutary power was involved. Whatever injury or inconvenience one may offer in such cases, he is under the eye of the law compensated by sharing the common benefit resulting from the summary exercise of this power, and which, under the circumstances, was absolutely necessary for the protection of the public." See also *Powell v. Commonwealth*, 14 Penn. 265, *supra*. It thus follows that where the law is a reasonable exercise of the police power, that it does not interfere with the guaranties of the right of freedom of contract.

(3) The third contention of the appellant is that the statute constitutes the taking of property without due process of law. Much the same answer can be made to this that has been made in article two. In the case at bar no property has been taken without due process of law.

(4) The fourth claim of appellant is that the 1911 statute is void as class legislation; that lard is singled out from all the articles of food and subjected to restrictions while being prepared for market. To this it need only be said that the law of 1911 as well as many preceding laws regulated the manner of selling every article of food and beverage. Lard, lard compounds, and lard substitutes being sold largely in pails required a particular regulation not necessary for the regulation of such articles as butter, eggs, milk and cream. The regulation of the size of the pail is but an incident of the law. The fact that all foods are subject to regulation to prevent the opportunity for deceit, is the main idea of the law. In appellant's brief the argument is made that the 1911 law is discriminatory in that it prescribes no regulations for such articles as Crisco, cottolene, vegetole, it being the contention of defendant that those articles which contain no animal fat are not "substitutes of lard." The witness Fox was placed upon the stand evidently to testify as an expert to this effect, but upon cross examination he admitted that those vegetable compounds are intended to and do take the place of lard and serve as a substitute for lard. The statute in express terms covers lard, lard compounds and lard substitutes, and in our opinion applies as well to Crisco and the other vegetable compounds as to lard itself, in so much as those articles are used instead and as a substitute for lard. There is therefore no discrimination

against the lard industry. To the effect that those compounds are lard substitutes, see:

- State v. Hanson, 84 Minn. 842, 86 N. W. 768, 54 L. R. A. 468.
 203 State v. Aslesem, 50 Minn. 5, 52 N. W. 220, 36 Am. St. 620.
 State v. Snow, 81 Ia. 642, 47 N. W. 777, 11 L. R. A. 355.

Upon the question of class legislation also see, *Powell v. Commonwealth*, 127 U. S. 678, *supra*, from which we quote: "The statute places under the same restrictions and subject to like penalties and burdens, all who manufacture, or sell, or offer to sell, or keep in possession to sell, the articles embraced by this prohibition; thus recognizing and preserving the principle of equality among those engaged in the same business."

- (5) The fifth claim of the defendant is that the law is in violation of the commerce clause of the federal constitution. In this we believe that appellant is again mistaken. The power of Congress and the power of the state are two distinct and separate things. Thornton in his excellent work on Pure Food and Drugs says in his preface: "In the last few years great interest has been taken in the subject of pure food. * * * The Federal Pure Food and Drug Act of June 30, 1906, has acted as an incentive for state legislation on the subject of foods and drugs. * * * Owing to the complex system of government under which we live, the states were not able to protect their inhabitants as effectually as was necessary or desirable. They had no power over food that entered into interstate commerce until it was too late adequately to protect the consumer. The federal Pure Food and Drug Act of June 30, 1906, is intended to cover all points which the states were not able to reach, and it has been far more efficacious in its provisions than perhaps the law of any state has been for its own citizens. But the federal statute does not by any means reach all instances of adulterated foods and drugs. By far the greatest quantity never passes beyond, and is never intended that it shall pass beyond, the boundaries of the state. Congress cannot regulate the sale of this food. It remains for the state to do so. There have been many statutes enacted by the states to cover this subject, especially since the adoption of the Federal Statute of 1906. There is no state in the union but what has enacted statutes on the subject of Pure Food and Drugs, and quite a number of them are modeled—at least in part—after this one of 1906."

- Whether or not the sale in this instance was an interstate or an intra-state sale becomes important in determining whether the prosecution should be under the Federal or the state laws, and for this purpose we refer to the testimony in this case. Mr. Howe, general manager of the Omaha plant, testified that they had a branch office in Fargo, N. D., to which point car load lots were shipped to
 205 be later broken up and distributed to the smaller towns of the state. Sales were not made to their customers in car load lots owing to the small size of local sales. Some of the state of North Dakota was covered from Aberdeen, S. D., in a like manner. Pro-

fessor Ladd testifies that on the eighth day of September, 1911, in the city of Fargo, N. D., he went to the person in charge of the Armour & Company establishment at Fargo and called for three pounds of Armour's Shield Lard. This was given to him and he paid therefor and took the same away. At that time the pail was one of a crate of twenty pails which had been crated for convenience in shipping. The manager of the defendant company broke open this crate and took therefrom the single three-pound pail of lard and then and there sold it to Professor Ladd. Under these undisputed facts we are asked to say that the single pail of lard was an interstate shipment and as such coming under the inhibitions of the federal pure food law of 1906, and thereby not a violation of the state law. We find the law upon this point pretty well settled in the courts of the various states and of the United States under the heading of original packages. The cases under this subject are collected in Thornton on Pure Food and Drugs, section 88, and we will but briefly refer to some of the leading cases mentioned by him. Thus in *Austin v. Tennessee*,

179 U. S. 343, 45 L. Ed. 244, 50 L. R. A. 470, 70 Am. St. 206 703, 48 So. 305, 101 Tenn. 563, it is said: "Original packages

are such as are used in bona fide transactions carried on between the manufacturer and wholesale dealer residing in different states," and in *Guckenheimer v. Sellers*, 81 Fed. 997, it is stated: "An original package within the meaning of the law of interstate commerce is a package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped." In *re Harmon*, 43 Federal 372, it was held that where several bottles of whiskey were wrapped in paper and sealed and packed in an uncovered wooden box and shipped from one state to another, that the wooden box was the original package and that the bottles were not. In one instance a merchant from Tennessee purchased from a factory in North Carolina a number of cigarettes in boxes which were shipped to him in small packages containing ten cigarettes each. Those packages were piled together upon the floor of the factory in North Carolina and the express company notified to come for them. An employee of the company took a large basket belonging to the company and gathered therein the small individual boxes, and put them upon the train and shipped them into Tennessee. In the latter state there was a law prohibiting the sale of cigarettes.

When the packages reached Tennessee the agent of the express company took the basket to the store of the defendant, emptied the packages upon the counter and took away with him the basket. The storekeeper sold some of the cigarettes and was arrested and convicted; he appealed to the supreme court of that state claiming that each small package of cigarettes was an original package and an inter-state transaction, making practically the same claim that is made in the case at bar. His conviction being affirmed in the Tennessee court, he then sued out a writ of error to the Supreme Court of the United States where the conviction was again affirmed, and the Supreme Court of the United States said "Original packages are such as are used in bona fide transactions carried on between the manufacturer and wholesale dealer residing in different states; where

the size of the package is such as to indicate that it was prepared for the purpose of evading the law of the state to which it was sent, it will not be protected as an original package against the police laws of that state." *Austin v. Tennessee* supra, also *Cook v. Marshall*, 196 U. S. 261, 49 L. Ed. 471, 104 Am. St. 283, 93 N. W., 372, 119 Ia. 384, where some boxes of cigarettes were shoveled into a car in Missouri and delivered in Iowa in that condition and where a conviction was sustained not only in the state courts, but upon appeal to the United States Court. See also, *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. Ed. 223, 30 N. E. 1127 15 L. R. A. 839 (affirming 156 Mass. 236); and *Crossman v. Lurman*, 192 U. S. 189, 48 L. Ed. 40 (affirming 17 New York, 329) which latter cases were decisions upon the law as it existed prior to the enactment of the 1906 United States law. Thornton says: "From a consideration of all the decisions and upon the basis of common understanding of the words, it seems that an original package within the meaning of the Food and Drug act is a unit complete in itself delivered by the shipper to the carrier, addressed to the consignee, and received by him in the identical condition in which it was sent, without separation of the contents in any manner. This unit may be a hogshead containing 500 bottle- of wine, or a single can of tomatoes, or it is a small ounce phial of some drug if shipped to the consignee in that form; and if the consignee sells or gives away any one of the three in the unaltered condition in which he received it, if the contents be adulterated or misbranded, he has violated the Act," Thornton referring of course to the United States act. It follows as a natural conclusion that if he broke the packages and sold one of them and it was misbranded it would be a violation of the state act.

The breaking of the original package once, if not twice (car and case), before the sale was made, added the goods to the general property of the state of North Dakota and the subsequent sale was an intra-state transaction and subject alone to the laws of the state of North Dakota. It naturally follows that the defendant is not protected under the commerce clause of the United States Constitution.

(6) We reach now that sixth heading, that in no event under a proper construction of the statute can a conviction be sustained. At the oral argument of this case counsel stated that they had no intention of raising any minor objection to the information nor did they desire a decision which would evade the question of the constitutionality of the law in question, and that under this objection they meant to be considered the following proposition; that the courts should give a reasonable construction to the law and in this instance hold that notwithstanding the wording of the law *and in this instance hold that notwithstanding the wording of the law* that it should be so construed as to permit the sale of any sized pail providing that the net weight were stated thereon. In answer to this we have to say that the wording of the statute is too plain to admit of any such construction. The object of the law was to prevent the opportunity for fraud presented when the pail did not contain an even number of pounds, net weight. Any other construction would effectually

wipe out the statute itself. This construction cannot be supported by reason or authority and it will not be adopted by this court.

(7) At the time of the oral argument, the objection was made to the statute that the Pure Food and Drug Act of June 30, 1906, was an assumption of the entire field by congress and that therefore the laws of North Dakota upon that subject were in effect repealed or rendered inoperative. Under section five we have outlined fully the field of congressional control and the field of state control. Congress can only regulate interstate commerce. The states have exclusive control of intra-state commerce and in the absence of legislation of congress have certain rights of control over inter-state commerce within the boundaries of the state, while Congress is limited to control of "Commerce with foreign nations, among the several states and with the Indian tribes." The assumption by Congress of its authority to regulate the interstate commerce effects nothing excepting the right of the state to control interstate commerce within its borders and does not in any manner curtail the right of the state to control its own commerce. It is thus seen that none of the objections raised by the defendant as to the validity of chapter 236 S. L. 1911, has any merit and as no other points have been presented to us, we must hold that the law is constitutional and the conviction thereunder is accordingly affirmed.

E. T. BURKE.

E. B. GOSS.

A. A. BRUCE.

BRUCE, J. (specially concurring):

I concur in the opinion of Mr. Justice Burke. The relative spheres of the courts and of the legislatures in the matter of the so-called police power control seem now to have been well defined by the courts of the country, and especially by the Supreme Court of the United States. In *Planters' Bank v. Sharp* (1848), 6 How. 301, 319, we find the following: "It is to be recollected that our legislatures stand in a position demanding often the most favorable construction for their motives in passing laws, and they require a fair rather than hypercritical view of well-intended provisions in them. Those public bodies must be presumed to act from public considerations, being in high public trust; and when their measures relate to matters of general interest, and can be vindicated under express or justly implied powers, and more especially when they appear intended for improvements, made in the true spirit of the age, or for salutary reform in abuses, the disposition in the judiciary should be strong to uphold them."

In the *Sinking Fund* case, 99 U. S. 718, 25 L. Ed. p. 501, Mr. Justice Waite, in speaking for that court, said: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in

no small degree upon the strict observance of this salutary rule." In the case of *Chicago, Burlington & Quincy Ry. Co. v. McGuire*, 219 U. S. 563, 55 L. Ed. 328, the court among other things said: "There is no absolute freedom to do as one wills or to contract as one chooses. The guarantee of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. * * *

Where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract: but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope

213 of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance. The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactment. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on

business, and having no just relation to the protection of the
214 public within the scope of legislative power, the act must fail." See also *People v. Smith*, 108 Michigan, 527; *Wanham v. State*, 65 Neb. 394, 91 N. W. 421; *Powell v. Pennsylvania*, 127 U. S. 678; *Holden v. Olson*, — N. D. —, — N. W. —, 13 Col. Law Review, 667. The trend of authority in the United States, indeed, is undoubtedly in support of the proposition that the main question for the courts to determine is whether the subject matter is one over which the legislature can exercise a supervisory control, and that the questions of method and of exigency are questions which must generally be left for the legislative bodies to decide: If a regulation is within the scope of the legislative power and its purpose is not arbitrary supervision, but the protection of the public, the mere fact that it may be unwise in the opinion of the courts or involve an added expense upon the consuming public is no justification for

judicial interference. The main arguments against the provisions of the statute which are now under consideration are that their enforcement might possibly prevent the sale of lard in packages in the State of North Dakota, or might so increase the cost of manufacture that an added price would have to be paid by the consumer. These matters, however, are for legislative and not judicial determination. The legislature is drawn fresh from the people. It has the power to appoint committees to examine and to investigate. It
 215 and the governor who has the power to veto and to prevent the passage of unpopular and unsocial legislation, have determined that the risk of this added expense shall be run, and have determined that the prevention of fraud and of short weights is at the present time the paramount necessity. It is too late to contend that the legislature in the proper case has not the size of the packages when that size may have a tendency to prevent a deception in weight. (See cases on size and weight of packages and of bread, etc., cited in the principal opinion.)

The reasoning of counsel for respondent may not appear conclusive to this court, but we cannot say that the legislature was not justified in considering it to be so. "Lard," says counsel for the state, "is a household necessity which is largely used in cooking and baking, and for convenience in handling, as well as for other reasons, it has become a universal and extensive practice to pack lard for sale in pails or containers of convenient size for meeting the requirements of the ordinary householder buying lard. These pails have acquired by usage the designation of 3 pound pails, 5 pound pails and 10 pound pails. The actual net weight of lard they contain depends upon the whim of the manufacturer. The actual amount of lard in these several pails put up by the defendant is as follows: In 3 pound pail, 2 pounds 6 ounces of
 216 lard; in the 5 pound pail, 4 pounds, 2 ounces of lard; in the 10 pound pail, 8 pounds, 10 ounces of lard. In the mind of the average buyer, however, the pail contains the number of pounds of lard which its name implies; that is, the 3 pound pail represents 3 pounds, the 5 pound pail represents 5 pounds, etc. In the absence of any law requiring the net weight of the commodity to be disclosed, the manufacturer or merchant has the opportunity to actually and even wilfully deceive as to the actual contents of the package. He may reduce the net weight of the lard or increase the weight of the package; and unless the container is opened and the contents actually weighed the consumer must depend upon the representations of the maker or merchant as to the real amount of lard he is getting. In actual practice the representations of the maker or merchant are accepted and acted upon by the general run of consumers. Nay more—the popular conception as to the quantity of lard is the conception accepted and acted upon by the ordinary buyer; and the maker and merchant can merely tacitly adopt the popular conception and profit accordingly at the expense of the buying public. In short, they can take advantage of the popular conception as to the quantity of lard and thereby collect without the

217 buyers' actual knowledge the same price for the weight of the package as they get for the contents. As a result of this practice the buying public not only may, but actually have been paying large sums for tin and packing which they would not have paid had their intention been specifically directed to what they were doing. * * * Labels disclosing the net weight are not effective in actual practice, because the popular designation of a package will continue to prevail in spite of labels. Then too, labels are oftentimes, and in fact generally are unheeded. The ignorant heed them not because they do not understand them. The busy housewife as a rule does not notice them. Then also, labels are easily removed or displaced either by intention or design. * * * The only safeguard to insure the effectiveness of such a law is to standardize the package: that is, to make the net contents correspond with the popular designation of the package. * * * The reason for not permitting fractions of a pound is obvious. If fractions of a pound were permitted, the difference between the size and appearance of two pails of different weights would not be readily discoverable, and hence deception and misrepresentation would be greatly facilitated. For example: It would be difficult without careful examination to see the difference between a two and one-half pound pail and a three pound pail." These reasons may not appear conclusive to the court, but we cannot say that the legislature was without reason in considering them.

218

Nor too is there any force in the contention that the statute in question is in derogation of the interstate powers of the Federal Congress. The most recent case upon the subject and upon which counsel for the defendants principally rely, (*Savage v. Jones*, 22 U. S. 501) makes it clearly appear that the mere fact that Congress may have passed a so-called Food and Drugs act has not tied the hands of the state in the case in question. State statutes in such cases are only invalidated where they interfere with or frustrate the operation of the acts of Congress. It cannot be said that the act in question does this. It is merely supplementary thereto. All that the act of Congress says is that if the weights of the package is given upon the label it shall be the correct weight. The case of *Savage v. Jones*, in fact, is an authority for and not against the state in this case. In it, it is true, the statute of Wisconsin was held invalid; but the statute of Wisconsin forbade the use of the federal label altogether. Federal regulations of interstate commerce have perhaps been widely extended, but we do not believe that the courts have *perhaps been widely ex-extended*, but we do not believe the courts have yet construed the power so as to take from the states the inherent rights of self-protection; nor can we

219 believe that it was ever intended by the framers of our government that the protection of a people of the state from fraud and adulteration should be dependent upon the whim of a federal congress located thousands of miles away, with no knowledge of local conditions, and located in what the late Justice David J. Brewer has termed the "lobby camp of the world." It also appears to me that in the case at bar, the question of interstate com-

merce is not really involved, as the original package seems to have been broken.

A. A. BRUCE.

FISK, J. (dissenting):

I cannot concur in the conclusions reached by the majority. Much that is said in the majority opinion concerning abstract propositions of law is concededly correct and no longer open to debate in the courts. Indeed, counsel in the case at bar do not disagree in the least upon those fundamental and well settled rules; nor do they seriously differ in any respect other than in the application of such rules to the case in hand. I take it for granted that all must agree that in its exercise of the so-called police power of the state the legislature does not have absolutely a free hand, but is restricted by certain constitutional limitations, and that it is
220 the solemn duty of the courts, when called upon so to do, to uphold such constitutional limitations, by pronouncing any act null and void which plainly transgresses them. Instead of the legislature being the exclusive judges, it is for the courts to determine whether an attempted exercise of such police power is necessary for the public welfare, or whether it is a mere arbitrariness, unnecessary and capricious interference with the legitimate business of the citizen.

I am, therefore, unwilling to sanction the doctrine that because Prof. Ladd, who concededly stands high in the public estimation as an expert on pure foods and pure drugs, drafted the bill which finally became the act in question, and that such legislation successfully found its way upon our statute books through the friendly offices of both the legislative and executive departments of the state, that this gives it a *carte blanche* which the courts are in duty bound to respect. If such a doctrine is to receive the sanction of the courts I fear that serious consequences may result, even through the best of intentions on the part of such distinguished experts as Prof. Ladd, although in good faith sanctioned by legislative and executive authority. That such doctrine is not the law I think
221 the courts have spoken in no uncertain language. A mere statement of the proposition ought to suffice to disclose its fallacy. In support of my position I deem it entirely useless to do more than refer to a few expressions of the courts and law writers upon the question.

The Supreme Court of Illinois has said: "When the police power is asserted for the purpose of regulating a useful business or occupation and the mode in which that business may be carried on or advertised, the legislature is not the exclusive judge as to what is a reasonable restraint upon the constitutional right of the citizen to pursue his calling or to exercise his own judgment as to the manner of conducting it." *Ruhrat vs. People*, 49 L. R. A. 181 and cases cited.

Upon the question as to what will justify the state in interposing its authority in behalf of society that court therein further said: "It must appear first, that the interests of the public generally as

distinguished from those of the particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what
 222 is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts."

As is very aptly stated by Freund on Police Power, Section 494: "To prevent an abuse of the police power for the alleged protection of health or safety or the alleged prevention of fraud, the courts must be allowed to judge whether restrictive measures have really these ends in view. A remote and slight danger should not be recognized as a sufficient ground of restriction and the provisions of the law should be scrutinized in order to see whether they in reality tend to effectuate their object."

Upon the question of the police power of a state and the restrictions upon its exercise, Marshall, J., in speaking for the supreme court of Wisconsin in a recent case, very exhaustively and accurately stated what I deem to be sound. Among other things, he said:

"It is conceded that the legislation in question was an attempt to exercise the police power of the state, which is inherent in sovereign authority under such limitations as exist in the national and state constitutions, and that if as a police regulation it is not legitimate, it is not the law through possession the form thereof. A legislative enactment approved by the executive and duly published
 223 is not necessarily a law or binding on any one in respect to his liberty, his business, or his property. It is such if it is susceptible of passing the judicial test or whether it is warranted by the fundamental law, which our constitutional system contemplates may be applied to all such enactments. Perhaps the thought sometimes expressed that the vital feature suggested, which every good law must possess, is not as fully appreciated by the law-making power as it ought to be, leading to infractions of some express limitation as well as that broad general restriction of legislative power contained in the declaration that

'All men are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.'

Too much dignity cannot well be given to that declaration. That it was intended to cover a broad field not practicable to circumscribe by any specific limitation or limitations cannot well be doubted. This court has given thereto its proper place in unmistakable language, particularly in recent decisions. *Durkee v. Jamesville*, 28 Wis. 464, 471, 9 Am. Rep. 500; *State v. Burdge*, 95 Wis. 390, 70 N. W. 347, 37 L. R. A. 157, 60 Am. St. Rep. 123; *State v. Currens*, 111 Wis. 431, 435, 87 N. W. 561, 56 L. R. A. 252; *State v. Kreutzberg*, 114 Wis. 530, 90 N. W. 1098, 58 L. R. A. 748,
 224 91 Am. St. Rep. 934; *State v. Froehlich*, 115 Wis. 32, 42, 91

N. W. 115, 58 L. R. A. 757, 95 Am. St. Rep. 896; *State v. Chittenden*, 127 Wis. 468, 521, 107 N. W. 500. Doubtless the fathers of the constitution foresaw the likelihood and danger of the security of personal rights, which the fundamental law was intended to firmly intrench with the judiciary as its efficient defender, being jeopardized at times by excessive regulation of the ordinary affairs of life, and with that in view incorporated in the fundamental law at section 22, article 1, that admonition so full of meaning:

'The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.'

The idea is found expressed now and then, that the police power is something not dealt with or affected by the constitution, at least in any marked degree, which is a mistake hardly excusable. The error suggested here and there, that the police power is 'a sovereign power in the state, to be exercised by the legislature, which is outside, and in a sense above, the constitution (*Donnelly v. Decker*, 58 Wis. 461,

17 N. W. 389, 46 Am. Rep. 637), or that a police regulation

225 which is clearly a violation of express constitutional inhibition is legitimate, subject to a judicial test as to reasonableness

* * * (*Tiedman, State & Federal Control*, Sec. 3), or that no police regulation, not condemned by some express constitutional prohibition, is illegitimate, or that legislation not so condemned is legitimate if the law-making power so wills, though it violates some fundamental principles of justice, or that the reasonableness of a police regulation, and whether it unjustly deprives the citizen of natural rights, is wholly of legislative concern (*Hedderich v. State*, 101 Ind. 564, N. E. 47, 51 Am. Rep. 768), and others of a similar character now and then found in legal opinions and text books, are highly misleading' and have been distinctly discarded by this court. *State v. Chittenden*, supra. As was there said, 'If it were true that all police regulations are legitimate which are reasonable, and all are reasonable which the legislature so wills, the constitution as to very much of the field of civil government would be of no use whatever. The contrary has been the rule without any legitimate question since *Marbury v. Madison*, 1 Cranch. 137, 2 U. S. (L. ed.) 60.'

The following significant expressions of this court as to the constitutional limitations in the exercises of the police power leave nothing further to be said on the subject:

226 'As the police power imposes restrictions and burdens upon the natural and private rights of individuals, it necessarily depends upon the law for its support; and although of comprehensive and far-reaching character it is subject to constitutional restrictions. * * * '*State v. Burdge*, 95 Wis. 390, 398, 70 N. W. 347, 349, 37 L. R. A. 157, 60 Am. St. Rep. 123.' *State vs. Redmon*, 134 Wis. 89, 15 Ann. Cas. 408.

Judge Marshall in the above case defines the term police power as "the power to make all laws which in contemplation of the constitution promote the public welfare." And he says "that both defines the power and states the limitations upon its exercise, it being understood that it is a judicial function to determine the proper subject

to be dealt with, and that it is a legislative function, primarily, to determine the manner of dealing herewith, but ultimately a judicial one to determine whether such manner of dealing so passes the boundaries or reason as to overstep some constitutional limitation, express or implied.

This court, in common with others, has said that the police power extends to legislation regulating, reasonably—that is, to an extent not entering the realms of the destructive—all matters appertaining to the lives, limbs, health, comfort, good morals, peace, and safety of society. * * *

As it is a judicial function to define the proper subjects
 227 for the exercise of police power (*Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71), it must be to decide, as to any enactment, whether it really relates to a legitimate subject, or under the guise of doing so violates rights of persons or property. The idea that all legislation is within the police power which the law-making authority determines to be so, and that all which might be within such power is within it if the legislature so determines, is as we have seen, a heresy, and one which was repudiated sufficiently for all time by the early decision, heretofore referred to, in *Marbury v. Madison*, supra, the American classic which first and conclusively defined the general character of the constitutional limitations and the relations of the legislature and the judiciary thereto and to each other. The doctrine here laid down more than a century ago in the unanswerable logic of Chief Justice Marshall has never been departed from, except accidentally, inconsiderately, or ignorantly.

These words of the Supreme Court of the United States, speaking by Mr. Justice Harlan, in *Mugler v. Kansas*, 123 U. S. 623, 661, 8 S. Ct. 273, 297, 31 U. S. (L. ed.) 205, express in a different form the spirit of the opinion in *Marbury v. Madison*, supra:

“The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are
 228 under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.” * * * It is not every enactment which will to some extent promote the public health, comfort, or convenience, which is legitimate. Otherwise the way would be open for legislative interference with the ordinary affairs of life to an extent destructive of many of the most valuable purposes of civil government. An expert on sanitation, or one on the manner of living best calculated to promote long and enjoyable life, who has become an enthusiast in his special study of the matter, could doubtless suggest a multitude of really, or apparently, good rules to be followed; the temperature of the air of sleeping rooms, the proper size of the rooms as regards the number of occupants, the arrangements for frequently changing the air by displacing that without

the habitation, the hours for sleeping, for retiring, and for arising, the amount and kind of food to eat, the proper number of meals per day, the proper admixture of solids and liquids and length of
 229 time for each meal, the amount and kind of exercise required, and other things too numerous to mention might be suggested for legislative interference, each with a provision for severe penalty for its violation, with a division of the penalty, perhaps, between the informer and the public, till one would be placed in such a straight-jacket, so to speak that liberty and the pursuit of happiness, the incentive to industry, to the acquirement and enjoyment of property—those things commonly supposed to make a nation intelligent, progressive, prosperous, and great—would be largely impaired and in some cases destroyed. That such an extreme would be regulation run mad and is quite improbable, 'tis true, but it would be possible without limitations of some sort, if a police law be conclusively legitimate merely because it promotes, however trifling in degree, public health, comfort, or convenience."

That police regulations must bear the judicial test of reasonableness under the circumstances, is well settled. *Plessy vs. Ferguson*, 163 U. S. 537; *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560.

The highest court in our land in the recent case of *Lochner vs. State of New York*, 198 U. S. 45, announced the principle that the individual right to make contracts in relation to business is a
 230 part of that liberty protected by the constitution. The court there fully vindicates the right of the individual to freedom in the conduct of any legitimate business and his right to make contracts accordingly.

The New York Court of Appeals in the recent case of *Schnaier vs. Navarre Hotel & Importation Co.*, 182, N. Y. 83, announced a principle in harmony with the foregoing. In condemning as unconstitutional a statute requiring that every employing or master plumber shall be registered and hold a certificate of competency from the examining board of plumbers of the city, the court said: "It is not within any reasonable or proper exercise of the police power, since provision for the registration of the firm as such, or for the registration of one or more members of the firm who were skilled plumbers to act for the firm, would be a sufficient protection to the public from all the dangers that the legislation was supposed to prevent or mitigate."

According to the reasoning of the majority opinion in the case at bar, as I construe it, the question, of the sufficiency of the protection afforded the public under the facts in the New York case would be held a legislative and not a judicial question.

With these preliminary observations and the foregoing well entrenched rules as to the limits controlling the legislative exercise of the police power in mind, I approach a consideration of the act in question, which is chapter 236, Laws 1911.

Such act purports to regulate "weights, measures and count of food products." Section 2 reads: "Every lot of lard or lard compound or of lard substitute, unless sold in bulk, shall be put up in

pails or other containers holding one (1), three (3), or five (5) pounds net weight, or some whole multiple of these numbers, and not any fraction thereof. If the container be found deficient in weight additional lard, compound, or substitute, shall be furnished to the purchaser to make up the legal weight. The face label shall show the true name and grade of the product, the true net weight together with the true name and address of the producer or jobber.

* * *

Appellant was informed against and convicted for selling to one E. F. Ladd "a quantity of lard, and not in bulk, which said lard was then and there put up, sold and delivered to said E. F. Ladd in a pail which then and there held more than two pounds and less than three pounds net weight of lard, to-wit, two pounds and six ounces of lard, and which said pail or container did not then and there have or display on the face label thereof the true net weight of said lard in even pounds or whole multiples thereof, but expressed the weight of the lard in pounds and ounces." The

232 quotation is taken from the information and it should be noted that the only complaint is that the pail did not contain even pounds, it being expressly alleged that the true net weight was stated on the face label thereof in pounds and ounces. Defendant appeals from the judgment of conviction.

The statute is assailed as unconstitutional upon various grounds, but two of which I need notice.

Appellant contends that the act complained of is unnecessary, unreasonable, arbitrary and capricious as applied to the lard industry at the date of the passage of the act; and as a side-light to show the correctness of such contentions it offered at the trial a large mass of testimony showing the growth and development of the lard industry, the business methods in vogue in the conduct of such industry at the date the act was passed, and also showing the effect of such act upon this industry. Such testimony is uncontradicted, and while the same is not necessarily of controlling or any particular weight in determining the constitutionality of the law in question, I here give space to the following summary of such testimony as stated in appellant's brief:

"Lard is not used as a food by itself, but only in the preparation of foods. It is a pastry shortening and cooking fat. It bears the same general relation to foods in the domestic economy as 233 seasoning or spices on the one hand and butter and oils on the other. The original shortening and cooking fats were vegetable products, notably olive oil, cocoanut oil, peanut oil and a considerable number of other similar vegetable oils. Indeed these oils have all along been used in large quantities for these purposes. To them should be added cotton seed oil, which is one of the most popular and commonly used shortening products at the present time. By a process of hardening and bleaching these oils have the general appearance and consistency of lard, and are put up in pails of similar size and shape.

Aside from the production of lard in the home and retail market, the principal source of supply is the packing establishments. In

these establishments lard is a by-product, utilizing the fact of the hog remaining after taking away the portions that commonly go into hams, bacon, pork loins and pork sides. The relative proportion of lard from these various sources at present sold in North Dakota has been estimated at 40% produced by local meat markets, 20% by consumers and 40% by packing establishments.

Originally lard was sold only in tierces or tubs, a method of sale commonly referred to as in 'bulk,' but early in the industry there arose a demand for smaller packages of a size suitable for the consumer and this demand has been supplied by lard in pails. The demand for this style of package began about the year 1880 and has grown until at the present time about 40% of the lard sold by the defendant in the United States is put up in pails.

The advantage of the handling of lard in pails are numerous to the manufacturer, dealer and consumer, namely; (a) the improved keeping and handling qualities of the article, both in the store and home; (b) the protection to the public against careless or dishonest tradesmen as to the quantity given; (c) the greatly improved sanitary condition of the product; (d) the preservation of its freshness, wholesomeness and bright appearance, which qualities are largely lost by exposure to the atmosphere; and (e) the greater convenience to the merchant in that it is already weighed and put up, and to the housewife in that it is delivered in a suitable receptacle for keeping the product, which receptacle may be afterwards used for other purposes.

From the beginning of the industry lard in pails has always been sold in gross weight packages. Manufacturers have always filled the packages to the full gross weight. There has been no disposition to give short weights.

From the beginning the price has always been based upon the price of the same grade of bulk lard, to which has been added only the cost of the labor and material required to make this convenient and sanitary package."

Attention is called to the fact that for a great many years all products sold by weight in package form have been sold on the basis of gross weight and that this is well understood by dealers, as well as by the public generally, and has been recognized as a legitimate business method and counsel for appellant argue that the effect of the law in question strikes a blow at this long established standard or method in the business world, and arbitrarily substitutes one heretofore unknown to the industry.

The evidence discloses that the appellant maintains packing establishments at numerous large centers throughout the country, at each of which points lard is prepared by it for market. That defendant manufactures its own pails of tin of a specified weight and size and that in such manufacture it has installed complicated machinery at great expense, and that the pails used by it at the time this prosecution was instituted consisted of twenty different styles and sizes, requiring an equipment of special material, machinery and appliances at each of its plants for the different styles and sizes

of such pails, and it offered expert testimony to show the expense which it would be to in complying with the act in question in order to supply the North Dakota trade. It is, of course, 236 perfectly apparent to anyone, and it needs no testimony to show, that to comply with this law the various lard manufacturers would be put to an enormous expense, which ultimately would have to be borne by the consumers of lard in this state. Such fact, however, is not a controlling consideration but merely a sidelight tending for what it is worth to shed light upon the reasonableness of the act in question. If the legislature in the enactment of such statute did not transcend the due exercise of its police power, and if the act in no way infringes the mandates of the federal or state constitutions, then it is clearly our duty to uphold the same, however onerous its provisions may prove to be, either to the manufacturers of lard or to the consumers thereof. This, of course, goes without saying for it is elementary.

One of the crucial questions for determination is whether the provisions of the act requiring the pails to contain "one (1), three (3), or five (5) pounds net weight, or some whole multiple of these numbers, and not any fraction thereof," is a reasonable and not a purely arbitrary and capricious requirement. Appellant does not question the power of the legislature to require the net weight of the article to be stated upon the outside of the wrapper or container and whether 237 appellant has complied with Chapter 195, Session Laws of 1907, thus prescribing as well as the other requirements of that law, in regard to the matters to be stated upon such wrapper, is not here in question. I do not think it can be successfully contended that the method thus universally in vogue in the lard industry at the time this law was enacted in any way tended to deceive or mislead the purchaser as to the weight and contents of the pails. It would seem clear, therefore, that there was and is no necessity or justification for that portion of the 1911 enactment here challenged. Will a package or pail of lard containing an even number of pounds (net weight) with a necessary gross weight somewhat larger, tend in any respect to protect the purchasers from fraud or deception to any greater degree than packages containing a net weight in pounds and ounces, when such net weight is plainly noted on the outside wrapper? Is it, in other words, within the proper exercise of the police power to prescribe that lard in pails cannot be sold except in certain designated quantities?

Again, is it within the legitimate exercise of legislative power to prescribe, as is attempted to be done in section 2 of the Act, a different classification as to the lard industry from that prescribed for all other industries in section- one and three thereof, the former relating generally to all articles of food and beverages, and the latter specifically relating to bread? By sections one and three no 238 restrictions whatever are placed upon the size of the package.

All food products except lard, may be sold in any quantity, provided that the net weight of the contents of such packages, excluding the wrapper, is "stated in terms of pounds, ounces and grains avoirdupois weight," or in case of articles sold by measure, is stated

in "terms of gallons of 231 cubic inches or fractions thereof, as quarts, pints, and ounces." And bread is authorized to be sold in whole, half and quarter loaves, and "when plainly labeled with the exact weight thereof," may be sold in any size or quantity. In other words, lard is singled out from among all the food products and beverages and placed in a class by itself in so far as the quantity which may be sold in a package is concerned. Why the legislature deemed such a distinction necessary I am wholly at a loss to understand. Neither the majority of the court nor counsel for the state have advanced any reasonable explanation for such discrimination, and I am forced to the conclusion that the attempted classification rests upon no natural nor reasonable ground, but is manifestly purely arbitrary and capricious. This appears so palpable and self evident to my mind after due reflection, that I have no hesitancy for this reason alone in pronouncing the Act unconstitutional and void upon its face.

In *Millett vs. The People*, 117 Ill. 294, the court on this question said: "We recognize fully the right of the General Assembly, * * * to prescribe weights and measures, and to enforce their uses in proper cases, but we do not think that the General Assembly has power to deny to persons in one kind of business the privilege to contract for labor and to sell their products without regard to weight, which at the same time allowing to persons in all other kinds of business this privilege, there being nothing in the business itself to distinguish it in this respect from any other kind of business."

As we have seen, the so-called police power of a state does not confer upon the legislature an absolutely free hand in prescribing rules and regulations of the character in question. Legitimate business transactions cannot be hampered or restricted or otherwise interfered with by the legislature, except to the extent reasonably required for the proper protection of the public interests or the public welfare. If the attempted police regulation clearly extends beyond the supposed threatened evil and is manifestly capricious and wholly arbitrary, it, to that extent, constitutes an unwarranted interference with the rights of the citizens to contract and it becomes the plain duty of the courts to interfere by adjudging such attempted regulation void.

The Act in question deals confessedly with a legitimate trade industry and the only possible justification for the attempted regulation is upon the ground that it is necessary to prevent fraud. But, as before stated, I am wholly unable to perceive how the enforcement of such new statutory restrictions will, or possibly can, operate in the least degree to this end. And moreover, conceding that it will to some slight degree thus operate, is this not manifestly true as to all other staple food products covered by the Act? Is there, in the nature or character of the lard industry, anything to differentiate it in the manner here attempted from the many other food industries sufficient to warrant a special rule applicable alone to the former? I think not, and this unwarranted discrimination is alone sufficient to condemn the statute.

My attention has been called to no statute elsewhere under which

such an exercise of the police power has been attempted by an legislature. A statute in Tennessee which was upheld by the supreme court of that state in the case of *State vs. Co-operative Store Co.*, 123 Tenn. 399, 131 S. W. 867, Anno. Cas. 1912 C. 248, is the nearest like the act in question of any I have discovered. The statute there in question made it unlawful for any person "to pack for sale, sell, or offer for sale in this state any corn meal except in bags or packages

containing by standard weight two bushels or one bushel or
 241 one-half bushel or one-fourth bushel respectively." Such Act also provided that "each bag or package of corn meal shall have plainly printed or marked thereon, * * * the amount it contained in bushels or fractions of a bushel, and the weight in pounds; provided, the provisions of this section shall not apply to the retailing of meal direct to consumers from bulk stock when priced and delivered by actual weight or measure." A violation thereof was made a misdemeanor. In sustaining the law against an attack upon the ground that it attempts to abridge the right of persons to contract, and deprives them of their liberty and property without due process of law, the court, among other things, said: "The object of this statute is the prevention of fraud in the sale of one of the most common articles of commerce and food. The fraudulent practice sought to be *expressed* is the sale of packages of corn meal, purporting, expressly or by implication, to contain certain weights and measures for which the purchaser is charged, when in fact they contain less quantities, whereby the public is deceived and defrauded to the extent of the deficiency in weight or measure of the package purchased. The prevention of fraud in general has always been recognized as well within the police power. Statutes enacted for this purpose and which have a fair, just, and reasonable relation to the
 242 preservation of the lives, health, morals and general welfare of the public, do not contravene the constitutional provisions here relied upon, although they may interfere to some extent with individual liberty, and the free use and enjoyment of private property."

I have no quarrel with the reasoning or conclusion of that able court in the light of facts of that case, but the statute in the case at bar is plainly distinguishable from the Tennessee act in at least one important particular. At the time of the passage of the Tennessee law there was a well recognized evil to be remedied. The act conclusively shows this by the language therein "that whereas the practice in this state of putting up and selling meal in short-weight packages is against the public welfare and the interests of legitimate trade." The portion of the above quoted opinion also expressly recognizes the existence of such fraudulent practice. It is to be noted also that the points that the act was an unnecessary and unreasonable exercise of the police power of the state, and that the same constituted an unwarranted discrimination and was class legislation, were not urged or raised by the defense. An entirely different situation is presented in the case at bar, as already observed. None of the numerous authorities cited and relied upon by the Tennessee court

involved facts parallel with those in the case at bar, and I
 243 am satisfied that the North Dakota statute is, in the light of
 the undisputed facts, unique in the history of such legisla-
 tion.

The contention that purchasers are or may be deceived in the
 quantity of lard purchased where the pails are not of the size pre-
 scribed in this Act, is, I think, not tenable, for, as above stated, the
 true net weight is required to be plainly stated on the outside
 wrapper of each pail. At least, this is all that in reason ought to be
 required in order to furnish such information, where, as appears
 here, no actual or attempted fraud or deception has ever been prac-
 ticed by the manufacturers or vendors of lard in this form. It is
 difficult to comprehend how much deception can occur to any
 appreciable extent, but if it does, how is the purchaser injured
 thereby when he gets all the lard which he pays for? The fact that
 he is in addition required to pay for the container and wrapper and
 the added expense of putting it up in this sanitary form, affords
 no just ground for complaint, nor does it justify the Act in question.
 This is true as to any sized pail and is according to a long and well
 established general custom of the trade of which he is presumed
 to have knowledge.

In *State vs. Hanson*, 118 Minn. 85, a statute providing in sub-
 stance that no person, firm or corporation shall manufacture or sell
 Oleomargarine which shall be in imitation of butter of any
 244 shade or tint of yellow, unless such oleomargarine shall be
 made and kept free from all coloration or ingredients caus-
 ing it to look like butter of any shade or tint of yellow, nor unless
 the same shall be kept and presented in a separate and distinct
 form, and in such manner as will advise the purchaser and con-
 sumer of its real character, was held unconstitutional for reasons
 therein stated. The decision is not particularly in point here but
 I think certain reasoning in the opinion lends support to my views
 as above stated. I quote: "We construe the law, therefore, as making
 criminal the sale or manufacture of oleomargarine purposely made
 of any shade or tint of yellow, whether the tint or shade be dark
 yellow, golden, or light yellow. Even as so construed section 1 of
 the law might be sustained as a valid exercise of the police power,
 if it made proof of an intent to deceive or defraud the purchaser or
 consumer, essential to a conviction. And it would be immaterial
 that no artificial coloring was used, or that the product was entirely
 wholesome, was exactly like butter in taste, or was in fact butter.
 The purchaser is entitled to know what he is buying; and any law
 enacted to prevent fraud or deceit, and having any fair tendency
 in that direction, would be valid. But this law does not make the
 intent to deceive or defraud essential to a conviction for a
 245 violation of section 1. Intentionally making oleomargarine
 of a shade or tint of yellow is made criminal, without proof
 of an intent to deceive. This being so, the law cannot be sustained,
 unless there is a reasonable probability that the purchaser or con-
 sumer will be deceived by the yellow shade or tint into buying or
 eating oleomargarine, mistaking it for butter. * * * The

power of the legislature to regulate its manufacture and sale rests, not upon the right to legislate in the interest of the public health, but upon the undoubted right to enact laws to protect the public against fraud and deception, to suppress false pretenses and promote fair dealing in an article of food. But we are quite unable to perceive how there is any but a remote possibility of deceiving the purchaser or consumer by making oleomargarine imitate butter in color, whether it be a conscious or accidental imitation. The intent to make oleomargarine of a shade or tint of yellow by the selection of ingredients is no evidence of an intent to deceive either purchaser or consumer. Oleomargarine is made to resemble butter of yellow color, not to deceive anybody, but because the public buys the substitute if it has the yellow shade, but refuses to buy it if it has a light shade. The intent is not to deceive the public, but to make an article which will find a market.

It seems clear, not only that there was no intent to defraud
 246 or deceive, but that the color of the product has, in view of the stringent provisions of the law that clearly tend to prevent deception, no fair tendency to make either purchaser or consumer mistake oleomargarine for butter."

The court then refers to the provisions of law relating to placards upon the tubs or packages in which it is exposed for sale, to the wrappers, stamped with the word "Oleomargarine," in which the retail dealer is required to deliver it to the purchaser, and to other like provisions and says: "It may be suggested that the guests of a private housekeeper have not this protection, or that store, hotel, or restaurant proprietors may not obey the law as to placards, or that a purchaser who cannot read may be deceived. But, granting that there may be a few instances where, by mistake, the consumer may take into his system oleomargarine, when he thinks he is eating butter, does this furnish a ground upon which the legislature can prohibit the manufacture and sale of a perfectly wholesome and healthful article of food? On the record before us, such a deception would be wholly without damage. In its last analysis, it is a mere matter of sentiment."

In a prior portion of the opinion it is also said: "There can be, however, no intent to deceive the purchaser or consumer, as the provisions of the law concerning labels on packages and wrappers are fully complied with. It is utterly impossible for the
 247 purchaser to be deceived."

The majority opinion cites certain decisions upholding the validity of ordinances prescribing the weight of loaves of bread. *People vs. Wagner*, 86 Mich. 594, is one of the cases cited, but I find in the opinion the following language which serves to differentiate this case from the case at bar. I quote: "Sales are invariably made in loaves in sizes of one (1), two (2) or four (4) pound packages, and the ordinance simply takes the usual and ordinary package or loaves in which bread is made, and fixes the standard of weight of each package. It does not prohibit the sale of bread by weight if it overruns, as it is claimed it sometimes does, nor does it prohibit the extraction of an increased price by reason

of the additional weight. It does not prohibit the sale of a half or a quarter or any other fraction of a loaf."

In the case at bar the undisputed proof shows a well established custom in the lard industry to put lard up in pails of the size of three, five, ten and twenty pounds gross weight but containing a label showing their net weight. The legislature, therefore, by section 2 of the Act in question, has not attempted to standardize these packages in accord with such general established custom, but
 248 it seeks to force a radical departure therefrom, without the least resulting benefit to anyone. It is to be observed by section one the legislature has, on the contrary, recognized the existing general trade custom as to all other food products as to weight, measure and numerical count.

I have examined the opinions in the other so-called bread cases relied on and I think practically all, if not all of them may be differentiated in like manner from the case at bar.

In this connection see *City of Buffalo vs. Collins Baking Co.*, 39 App. Div. (N. Y.) 432, where the court upheld the lower court's decision reported in 53 New York Supp. 968, holding an ordinance fixing the weight of loaves of bread at not less than one and one-half pounds each, and prohibiting sales thereof in any other size, to be unconstitutional and void, under facts quite analogous to those in the case at bar, as an unreasonable exercise of the police power, and an unwarranted interference with the rights of persons engaged in a legitimate business. I think the reasoning and conclusion of the court are sound, both on principle and authority.

I think that the portion of the Act here in question is unconstitutional and that it is our plain duty to so decide.

In what I have above stated I do not wish to be understood
 249 as holding that this whole Act is unconstitutional, but merely that portion of section 2 prescribing the sizes of the pails or packages. I think the objectionable feature may be eliminated without affecting the balance of the Act.

I think the judgment should be reversed.

C. J. FISK.

I concur.

B. F. SPAULDING.

250 On the 10th day of January, A. D. 1914 there was filed in this Court the following Petition for Re-hearing:

Title.

Petition for Rchearing and Reargument.

Upon the complaint of E. F. Ladd, the defendant was informed against by the state's attorney for Cass county on September 15, 1911, charged with an alleged violation of Section 2 of Chapter 236, Laws of 1911. (Abst. fols. 1-11.)

The information upon which the defendant was tried and convicted, alleged that on the 8th day of September, 1911, in the City

of Fargo, the defendant "did wilfully and unlawfully offer for sale and sell to one E. F. Ladd a quantity of lard, and not in bulk, which said lard was then and there put up, sold and delivered to said E. F. Ladd in a pail which then and there held more than two pounds and less than three pounds net weight of lard, to-wit, two pounds and six ounces of lard, and which said pail or container did not then and there have or display on the face label thereof the true net weight of said lard in even pounds, or whole multiples thereof, but expressed the weight of the lard in pounds and ounces." (Abs. fol. 21.)

Defendant demurred to the complaint upon the following grounds:

"1. That it appears upon the face of said information that the same does not state facts sufficient to constitute a public offense."

2. That the court has no jurisdiction of the subject matter alleged in the complaint." (Abst. fol. 12) Which demurrer was overruled.

At the close of the state's case, the defendant moved to dismiss the information and specified the following grounds therefor in addition to the constitutional questions which are considered in the Court's opinion:

251 "1. Because the complaint as amended herein does not state facts sufficient to constitute an offense or crime under the laws of the State of North Dakota."

"2. Because the said Chapter 236 of the Laws of 1911 does not penalize the offering for sale or the selling of lard in manner and form as the same was sold in this case, the only thing which is penalized in said statute being the putting up of said lard in form as required in Section 2 thereof."

"4. Also for the reason that the said act violates the provisions of the Federal Constitution in that it attempts to punish the defendant for an act or acts which were committed wholly outside of the State of North Dakota, to-wit, the act of putting up lard in pails, the contents whereof are not measured by a pound or even multiples thereof, and it is beyond the competency of the legislature of North Dakota to make criminal such acts when they are done outside of the limits of the State of North Dakota." (Abst. fols. 33 and 35.)

This motion was also overruled. (Abst. fol. 37.)

The foregoing motion in its entirety and with added grounds was renewed at the close of the entire case (Abst. fol. 465), and was overruled. (Abst. fol. 471.) A verdict of guilty was returned. (Abst. fol. 489.)

The defendant also moved for a new trial (Abst. fols. 489-490,) specifying the following grounds:

"1. That the court erred in not directing a verdict in favor of the defendant.

"2. That the verdict is contrary to law.

"3. That the verdict is against the evidence.

"4. That there is no evidence to support the verdict.

"5. That it appears affirmatively by the evidence that no public offense has been committed by the defendant.

Which motion was overruled and exception granted to defendant." (Abst. fols. 489-490.)

The defendant also moved in arrest of judgment, stating among other grounds the following:

"1. That the evidence is insufficient to show the defendant guilty of any public offense.

252 "2. That the information does not state facts sufficient to constitute a public offense."

"That it appears from the face of the information that the public offense charged to have been committed by the defendant is based upon a statute obnoxious to and controverting the provisions of the Fourteenth Amendment to the Constitution of the United States in that it interferes with and restricts the right of commerce between states, and attempts to punish the defendant for an act or acts committed outside of the State of North Dakota." (Abst. fols. 491-492.)

The defendant also specified the insufficiency of the evidence to sustain the verdict. The specification of insufficiency was made in the trial court and settled in the record, (Abst. fols. 6 and 7) and is repeated in appellant's brief on pages 8, 9, 10 and 11. This and the eight assignments of error furnish the basis for the review asked for in this court.

The case was tried below on January 9th, 1912; judgment was entered on April 8, 1912, and thereafter the appeal was taken. The record was sent up by the Clerk of the District Court on January 28, 1913. The appeal was submitted to this court on November 3, 1913, all judges present. The submission was made upon the printed abstracts which sets forth the proceedings in the trial court and all evidence offered by the respective parties and upon appellant's original brief, respondent's brief, and appellant's reply brief. The case was argued orally by A. B. Stratton and N. C. Young for appellant, and by Judge Carmody, Assistant Attorney General for the state, Assistant Attorney General Zuger also being present at the argument.

On December 17, 1913, an opinion was filed under the name of Judge Burke sustaining the judgment which opinion was fully concurred in by Judges Goss and Bruce; the latter filing a concurring opinion with supplemental reasons and citations. Judge Fisk filed a dissenting opinion in which Chief Justice Spalding concurred. The defendant believing that the majority of the Court have fallen into material and substantial errors of fact and law in the opinion filed and in the conclusion announced and that the writer of the opinion and the judges joining therein, overlooked controlling constitutional provisions, statutes and decisions, and have over-
253 looked undisputed facts of record, and have without authority gone outside of the record and gathered information and recited and given weight in the opinion to certain alleged information and facts which are incorrect, and it appearing from the opinion that such erroneous information and facts and recitals

largely, if not wholly, controlled the decision; and the Court having failed to consider and decide a number of material and controlling questions, which were regularly submitted for decision and thereby, as defendant believes, doing it an injustice; it now therefore avails itself of the privilege of petitioning for a rehearing, which petition is respectfully submitted for the consideration of the court to the end that a re-argument may be granted so that the errors which we will attempt to point out may be corrected.

This petition is necessarily directed to the controlling opinion, which is under the name of Judge Burke. Whenever reference is made to the concurring opinion of Judge Bruce, it will be specifically so stated. In order to make our objections reasonably intelligible, we have printed the Court's opinion and attached the same to this petition so that it may be conveniently referred to by the court in considering the grounds of our request, which are as follows:

I.

The opinion disregards the mandates of the State Constitution contained in Sections 101-102, which are as follows:

SECTION 101. "When a judgment or decree is *revised* or affirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided and the reasons therefor shall be concisely stated in writing, signed by the judges concurring, filed in the office of the Clerk of the Supreme Court, and preserved with a record of the case. Any judge dissenting therefrom may give the reasons for his dissent in writing over his signature."

SEC. 102. "It shall be the duty of the Court to prepare a syllabus of points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case."

Our first protest is that the court has not considered and decided all of the questions we presented.

254 The questions which defendant presented to this Court, for its decision are embodied in the Assignments of Error settled in the record and prefixed to Appellant's brief and read as follows:

"1. The court erred in overruling the demurrer of the defendant to the information as filed and presented. (Abst., pp. 5, 6 and 8.)

2. The court erred in overruling the motion of the defendant to dismiss the complaint made at the close of plaintiff's case. (Abst., pp. 11 and 12.)

3. The court erred in overruling the motion of the defendant to dismiss the action made at the close of the entire case. (Abst., p. 119.)

4. The court erred in overruling the motion of defendant for dismissal of the action at the close of the entire case. (Abst., p. 120.)

5. The court erred in finding in favor of the plaintiff and against the defendant and ordering the defendant to appear and further answer and abide the order of the court, same being made by written opinion and order dated January 20, 1913.

6. The court erred in denying defendant's motion in arrest of judgment. (Abst., pp. 125 and 126.)

7. The court erred in rendering and entering final judgment against the defendant. (Abst. p. 126.)

8. The court erred in denying defendant's motion for a new trial. (Abst., p. 125).

Specifications of Insufficiency.

1. The evidence is insufficient to justify the verdict and judgment in that the testimony fails to disclose the commission of any offense against the laws of the State of North Dakota by the defendant.

2. The evidence is insufficient to justify the verdict and judgment in that it affirmatively appears therefrom that none of the acts committed by defendant were contrary to any valid or constitutional law of the State of North Dakota.

3. The evidence is insufficient to justify the verdict and judgment in that it is clearly established by the evidence that the legislative act upon which the action is founded is contrary to and repugnant to the provisions of the 14th Amendment of the
255 Constitution of the United States in that it denies to the defendant the equal protection of the law.

4. The evidence is insufficient to justify the verdict and judgment in that it clearly appears that the legislative act upon which the action is founded is violate of and repugnant to the provisions of the Constitution of the United States in that it attempts to punish the defendant for an act or acts wholly outside the State of North Dakota, and that said act violates the commerce — of the Constitution of the United States.

5. The evidence is insufficient to justify the verdict and judgment in that it clearly appears from the evidence that the legislative act upon which the said action is founded is arbitrary and unreasonable, and deprives the defendant of property without due process of law.

6. The evidence is insufficient to justify the verdict and judgment in that it clearly appears that said act violates the right of freedom of contract secured to all citizens by both the Constitution of the State of North Dakota and the United States." (App. Brief, ppp. 8-9-10 and 11.)

The Court announces no decision upon the assignments of error, except possibly upon the Seventh Assignment which relates to the entry of judgment. Argumentatively the court considers several questions which are involved in a number of the assignments; but announces no decision upon the errors complained of. The questions involved in the first assignment, the insufficiency of the information are wholly ignored and this is true of a number of questions which are involved in other assignments.

Our original brief following the assignments of error and the preliminary statement as to the "growth and nature of the lard industry," pages 12 to 20, and the consideration of the "North Dakota statute of 1911" pages 20 to 22, and the "Nature and extent of the

police power in respect to regulating trades and occupations," pages 22 to 26, present and discuss at length the following propositions in support of our assignments:

(1) Every exercise of the police power must be reasonable. (Pp. 26 to 28.)

(2) It is a judicial question whether the particular trade or calling requires or justifies police regulation and whether such regulation extends beyond the threatened evil. (pp. 28 to 32.)

(3) Section two can be justified, if at all, only on the basis that it is necessary to prevent fraud. (pp. 32 to 35.)

256 (4) At the time this statute was passed the law of 1907 requiring the markings of all packages of food with the true net weight was in full force and effect and is still applicable to lard, lard compound and lard substitute. (pp. 35 to 37.)

(5) The net weight law of 1907 being applicable to the products in question there is no justification for the statute of 1911. (pp. 37 to 41.)

(6) Section two is in violation of the commerce clause of the Federal Constitution. (pp. 41 to 48.)

(7) The classification contained in section two is arbitrary and without reason, and therefore cannot be justified as a proper exercise of the police power. (pp. 48 to 63.)

(8) If the statute is to be construed as forbidding the sale of lard in pails or any other than the size stated, it is an unreasonable and unlawful exercise of the police power, because it goes beyond the evil sought to be cured. (pp. 63 to 66.)

(9) The true rule applicable to a statute fixing a standard size of an article or package is that such statute was only intended to apply to articles when sold by the statutory designation and was not intended to apply to the same article when sold by another designation. (pp. 66 to 73.)

On pages 72 and 73 we said: "We submit the trial court was in error in finding a violation of the statute because the statute was not intended to prohibit the sale of lard in pails of other sizes than that specified in the act, provided the article was not sold as a pail of lard but by the pound and its true weight was correctly given and agreed upon, and this view, we believe, will commend itself to the sound judgment of the court." Again on pages 93 and 94 after referring to other contentions: "Putting aside the foregoing considerations, in no event can the statute be justified except on the ground that it was not intended to prohibit the sale of lard in pails, but only to establish a standard for pails of lard by which the ordinary transactions of commerce would be controlled in the absence of any clear understanding or agreement to the contrary."

On page 23 of our reply brief we stated: "No attempt has been made to meet the contention that the proper construction of
257 this statute does not prohibit the sale of lard in any size package the parties desire or choose when priced or delivered by actual weight * * *"

"In no event under the proper construction of the statute can a conviction be sustained." (p. 24.)

It is possible that the errors and omissions of which we complained

are due in part to the fact that the writer of the opinion quoted at folio 40 and took as the basis of his argument the closing paragraph of our reply brief. It is possible that because of having two briefs that our original brief containing the assignments of error, and our propositions hereinbefore set out, did not come to the court's attention and it may be that we were in fault in our method of presentation.

II.

The reason given by the Court for not considering the other questions presented by our assignments and covered by our briefs and oral arguments is not sound. At folio 39 of the opinion the Court says: "In view of the importance of the subject, we will disregard any question other than the constitutionality of the said act of 1911." We agree that the constitutional questions discussed in the opinion are important, but we submit that they cover only part of the grounds presented by us for a reversal of the judgment, and furnish no legal reason or justification for refusing to consider and decide the questions which we have submitted.

The defendant stands convicted of a violation of a penal statute and has appealed to this court asking for a reversal of the judgment. If any one of the reasons or grounds assigned by it are well taken, the judgment should be reversed, and the court cannot properly affirm the conviction until it shall have first determined each of the questions presented adversely to our contention. For instance, does the complaint state facts sufficient to constitute a cause of action? If it does not, then the judgment should be reversed. Does it appear from the evidence that the offense, if any, was committed, was outside of the jurisdiction of the court as we contend? This is not answered by the opinion. If it was the conviction should not stand. Does the statute condemn the sale of pails which are not put up in even net pounds, or does it merely require them to be put up
258 in even net pounds, and permit them to be sold if they are properly labeled, as provided by section 1 of the Act in question? If the court can say in this case that it will consider only such questions as it may select because in its opinion they are the most important, or for other reasons, it can do the same in all cases. This, we think, constitutes a disregard of the constitutional mandate above quoted. For illustration, suppose a man is convicted of murder in the first degree and sentenced to death, and takes an appeal to this court, and assigns as grounds for reversal: (1) That the law under which he was convicted was not constitutionally passed and is not, therefore, a law; (2) That the information does not charge a public offense; (3) That the evidence does not show that he is guilty. The constitutional question in the supposed case would be very important, but would this court be justified in deciding only the constitutional question, and after sustaining the law thus affirm the judgment without deciding the other questions which in point of fact might require a reversal and save a human life?

The foregoing is an exaggerated illustration, but the principle is the same as in our case. In the case at bar, the court has considered constitutional questions only and has affirmed the judgment

without considering or deciding the other questions which were regularly presented and which in our opinion would require a reversal of the judgment. At least we are entitled to a decision upon all questions presented. We submit that upon mature reflection, the judges who have joined in the majority opinion should set the case down for re-argument, so that all of the questions, which have been presented, may be considered and determined.

III.

Likewise the Court is in error in stating later in the opinion another reason for not considering the other questions covered by our assignments. At folio 165, the Court says: "At the oral argument of this case, counsel stated that they had no intention of raising any minor objection to the information, nor did they desire a decision which would evade the question of the constitutionality of the law in question * * *" In this statement the Court is in error. Our intention is manifested by the assignments of error settled in the trial court, and repeated in the opening *our* brief. We are compelled to take issue upon this statement of an alleged waiver. We assert that not only has there been no intention to waive a decision upon any of the questions raised by our assignments, but that there has been no written or oral waiver of any of them.

The defendant's first step in this case was to demur to the information. The Court's ruling upon this constitutes our first Assignment of Error. We have constantly insisted that the complaint did not charge a public offense, and further that the evidence did not show the commission of a public offense. The duty of arguing this question orally was assigned to the writer of this petition, and he argued it as the closing proposition in his argument to the best of his ability. With the statute in question open before us we called the Court's attention to the fact that it consists of four sections; that section 1 merely prohibits the sale of packages which are not labeled with the net contents in pounds and ounces, and does not prohibit the sale of packages which are labeled with the net weight; that section 2 of the act, prohibits the putting up of lard in pails of other than even net pounds weight; that said section relates to the putting up of lard and does not prohibit or refer to sales of lard; That section 3 relates wholly to the regulation of loaves of bread; that section 4 provides the penalty. It was contended by us that the information which we have hereinbefore quoted, which charges a sale of a pail of lard, which is not in even net pounds, but was in fact labeled, does not charge a violation of Section 1 which relates to the selling of packages; and does not charge a violation of Section 2 because the information charges a sale, and not a violation in putting it up; and third that the evidence shows that the lard in question was put up in a foreign state and outside of the jurisdiction of this state. Judge Carnody asked and was given leave to answer this argument, and contended that the statute, if properly construed, would sustain the information. Assistant Attorney General Zuger was also present. We are

compelled to take issue with the court upon the statement that at the oral argument we waived a decision upon the questions which the court has not considered and decided, and appeal upon this question of fact to the memory of each of the five judges, who were on the bench, and to the attorneys and persons who were in the court room.

260 The defendant also complains because the majority opinion, where it purports to quote chapter 236 of 1911 at folios 31 to 36, does not quote it fully, but omits the sectional numbers and divisions, which in our view are material parts of the statute. Before the words "every article" folio 30, the opinion omits "Section 1, Food sold by weight, measure or count." Before the words "every lot of lard" folio 32, the opinion omits—"Section 2, weight of lard." At folio 34 before the words "a loaf of bread" the opinion omits "Section 3, weight of bread." A reference to the statute as it was passed by the legislature and published in the Session Laws will show that Section 1 relates to sales, and only prohibits sales where the net weight is not shown on the package; section 2, requires lard to be put up in even pound net packages and does not refer to sales at all; section 3, relates wholly to the subject of bread. The opinion throws these three sections relating to different subjects together and into what would appear to be one section without any division. The uniting of these sections and the disregarding of the legislative divisions affects to some extent at least the construction of it. In other words, by combining the sections, the court changes the legislative intent. This is judicial legislation. The opinion states, whether correctly or not we are not advised, that this law was written by Prof. Ladd. If this is a fact, it was written, we suppose in the form in which it passed the legislature. If he is not satisfied with the division into sections and wishes to combine the three sections into one, he should ask the legislature to do this and not make his request to this court, not ask an interpretation of it which in the form it passed it will not bear. In our assignments and brief we asked a construction of this act as it passed the legislature, divided into four sections. The changes made by the omission of the sectional divisions is material in a proper construction of it. Our objection also applies to the description of the act in the syllabus, folio 3, and in this connection we would call the court's attention that in none of our assignments and nowhere in the brief or oral argument have we attacked, or do we attach any part of Chapter 236, save and except Section 2; we do not attack Section 1 or Section 3 or Section 4 and never have, and the court is therefore in error in assuming that we have attacked or do attack the entire law.

261

V.

The court also errs in asserting or representing that the legislation in this jurisdiction on the subject of "pure foods and honest weights and measures" commenced with Prof. Ladd in 1899, that is 14 years ago, and in yielding its judgment as to the necessity for and meaning of the statute to the opinion of the pure food commissioner. The

syllabus opens with this statement, (Folio 2): "Beginning with chapter 72 S. L. 1899, North Dakota, has each year enacted legislation upon the subject of pure foods and honest weights and measures." And the opinion opens folio 25 with the statement that, "Beginning with Chapter 72 Session Laws of 1899, the legislature of the State of North Dakota enacted various laws relative to pure foods and honest weights;" and at folios 60 to 63 the majority say: "As early as 1899 the legislature of this state provided for a food commissioner and enacted pure food laws; and every session of the legislature since that time has contributed further legislation upon the subject. For nearly fourteen years Prof. Ladd has been State Pure Food Commissioner, and the Agricultural College of this state has maintained a department for testing of foods and weights and often has had men traveling over the state making purchases and studying the subject of pure foods and honest weights and measures in a scientific and pains-taking manner. The 1911 law was drafted by Prof. Ladd after 12 years of observation and study; he is one of the recognized authorities of the United States and his opinion upon this subject might alone be enough to create a doubt of the proposition advanced by the defendant that there is no necessity for the law * * *."

The fame of Prof. Ladd, his activities and skill are outside of the record. To be correct, his profession is that of chemist, and his reputation does not lie in legislative or judicial fields. The propriety of injecting this fulsome eulogy in a judicial opinion is for the Court to determine and is not for us to criticise. We are concerned, however, as members of the bar at the inaccuracy of the representation that the advent of Prof. Ladd in 1899 marks the beginning of the laws in this jurisdiction upon the subject of "pure foods and honest weights and measures." The statement is historically inaccurate as the members of the court will readily see if they will consult the Session Laws and Codes of the territory and state. "The beginning" was not 14 years ago when Prof. Ladd's activities commenced as the court indicates, but was at the first session of the territorial legislature in 1862 more than fifty years ago, when that legislature passed Chapter 45, which prohibited and penalized the adulteration of foods and drugs and also passed Sections 149 and 151 of Chapter 9, penalizing false weights, false pretences and cheats. Since that time the people of this jurisdiction have always had statutes prohibiting adulterations affecting health and laws prohibiting false cheats, false pretences and frauds in the sale of food and drugs. The penal code of 1877 had the following: (Section 452) Fraudulently increasing weights. (Section 453) Adulteration of foods and drugs. (Section 454) Forbidding the sale of tainted foods, beverages and drugs. (Section 618) Prohibiting cheats. (Sections 629 to 634) Prohibiting false weights and measures. Section 634 reading as follows: "Every person who knowingly marks or stamps false or short weight or false tare on any cask, or package or knowingly sells or offers for sale any cask or package so marked, is guilty of a misdemeanor." See also Chapter 93 of 1874 and 1875.

prohibiting false weights and measures; also chapter 64, Laws of 1885, prohibiting the sale of unwholesome foods and beverages.

The Revised Codes of 1895 contained a complete set of laws upon these subjects. Section 7489—Cheats; Section 7500 to 7505—False weights and measures; Section 7505 being the same as Section 634 of the 1877 Code above quoted; see also Sections 7639 to 7648 prohibiting the sale of adulterated products; Sections 7649 to 7652, prohibiting the sale of adulterated and unwholesome food and drugs; Section 7308, fraudulently increasing weights; Section 7309 adulteration of foods and medicines; Section 7310, selling adulterated foods; Section 7286, adulterated medicines. The 1905 Code and our existing laws still preserve a complete body of laws prohibiting cheats and frauds and the adulteration and sale of unwholesome foods, which are entirely independent of the laws drafted by Prof. Ladd and passed during his period of activity. These laws will be found in the following Sections: Sections 9419-20-21-22 continued from Chapter 64, Laws of 1885, prohibiting the sale of unwholesome and adulterated foods and medicines. Section 8991, continued from 1887 prohibits the mixing of poisons with foods and medicines. Section 9042 from

1877, prohibits the false labeling of drugs and medicines.
263 Section 9049 from 1877, prohibits the adulteration of foods, drugs and liquors. Section 9050 from 1877, prohibits the adulteration of candies; Section 9051 from 1877, prohibits the sale of unwholesome foods, drinks and medicines; Section 9246, which in substance has been in force for fifty years, prohibits false pretenses and cheats; Section 9262, continued from Section 634, from 1877, this is for 37 years, prohibits false labeling. It will thus be seen by referring to the Session Laws and Codes that our pure food laws and laws against fraud had their origin when the territory was organized, and there has been a complete body of laws on these subjects ever since, and further, that the legislature has preserved these laws to the present time. Prof. Ladd has been responsible for a number of additional laws, and we do not wish to deny him proper credit therefor, but the sweeping statement in the opinion is misleading and incorrect and is unjust to the pioneer legislators of the territory and state and our lawmakers and code commissioners who were responsible for furnishing us with good and wholesome laws upon these important subjects.

VI.

The defendant also complains that the majority opinion does it an injustice and also an injustice to the court itself in imputing in the syllabus and opinion that the defendant practiced a fraud and deceit upon Prof. Ladd in selling him the pail of lard in question. Folio 5 of the opinion states: "In October, 1911 the said Food Commissioner went to this branch establishment in Fargo and asked to purchase three pounds of lard; he was sold a pail containing 2 pounds and 6 ounces." This is repeated in the opinion, folios 37 and 38 in this language: "In October, 1911, Prof. Ladd, State Food Commissioner, went to this establishment and asked to be furnished 3 pounds of Armour's Shield Lard; he was sold a pail, which is one

of the exhibits in this case, and which admittedly contained 2 pounds and 6 ounces of lard * * * ." The imputation and inference from this incomplete statement is that the defendant fraudulently and by deceit sold and delivered to Prof. Ladd this pail, representing it to contain 3 pounds of lard. The evidence shows that this imputation of fraud and deceit is unjustified; that on the contrary no deceit was practiced. Prof. Ladd knew just what he
264 was buying and he bought and paid for this package containing 2 pounds and 6 ounces of lard, knowing that it contained this quantity. It was labeled 2 pounds and 6 ounces and he saw the label and so testified. In justice to defendant and to the end that the court may remove from its records this injustice and incorrect imputation, we will quote from Prof. Ladd's testimony on the subject: (Abstract folios 24 to 48.)

"Q. When you purchased it, what did you call for?

"A. I called for 3 pounds of Armour's Shield Lard.

"Q. And received the pail in question?

"A. I did.

"Q. And it had upon it when you purchased it the sticker?

"A. The sticker?

"Q. Showing the net weight?

"A. The sticker that is now there. Yes sir.

"Q. You have related all of the conversation that occurred between yourself and Mr. Sirrs in connection with the sale of this Exhibit "A," have you professor?

"A. I do not think I have all of the conversation.

"Q. I mean all of the conversation in relation to the purchase of this pail of lard?

"A. Yes sir, unless you would refer to the statement made by Mr. Sirrs, as I now recall it, that he was selling these in small medium and large containers.

"Q. That is, that he had three different sizes of pails?

"A. In infer so, yes sir.

"Q. And this was—this pail you brought here is the one you bought?

"A. It is."

"Q. The label on this can doesn't express the net weight in even pounds or multiples of even pounds, Professor Ladd?

"A. It does not.

"Q. What does the label show the net content to be?

"A. Two pounds and six ounces."

"Q. And you observed of course, this label when you made the purchase?

"A. I did.

"Q. And you observed that the net contents as stated upon the can which you thus bought did not express in even pounds the net weight of the lard?

"A. I did.

"Q. I believe you said in your testimony that when you called for a three pound pail of lard that Mr. Sirrs said they did not have that, but had a pail, or, what was your language?

"A. He said that they were selling them as small, medium and large sizes.

"Q. Selling lard as small, medium and large?

"A. Yes.

"Q. And then you asked for a small pail, did you?

265 "A. I told him I would take a three pound pail, which I suppose he meant was a small pail.

"Q. And then you obtained this pail which is in evidence?

"A. I did." (Abst. fols. 26-28-29-31-32, 40 and 41.)

VII.

The defendant also complains of the inaccuracy of the court's statement and imputation that it, or the lard dealers, are, or ever have engaged in selling short weight pails, or that we have contended or do contend that the sale of short weight pails should be permitted. At folio 20 the syllabus states: (6) "It is contended by defendant that the act should be given a reasonable interpretation thus permitting the sale of short weight or gross weight pails, if labeled with the net weight.

Again Folio 87. "No reason is given why short weight pails were used in the beginning."

Again Folio 91. "There is no reason for furnishing other states with short weight pails."

Again Page 50. The Governor and the legislature "have determined that the prevention of fraud and of short weights is at the present time the paramount necessity."

At Folio 13, the court concludes that there is an absence of reason given "why laws should not be enacted to regulate this abuse," presumably referring to the sale of short weight pails.

The defendant has done a double injustice by these statements: First, they are defamatory and amount to a charge of dishonest dealing and fraudulent practice, and are untrue under the undisputed evidence in the case. And secondly, they have been taken by the majority of the court as the basis largely for the decision in this case. This error has apparently resulted from a misunderstanding of the meaning of the terms gross weight, net weight and short weight. That is the only way we can account for the error. Up to the passage of the 1907 law, requiring the labeling of packages with net weights, the defendant and all others selling lard in pails, sold by gross weight. Since the passage of that law, this defendant and all other reputable dealers have complied with the labeling law and have sold their goods at net weight. According to the common understanding of men, a sale by gross weight of packages or pails means just what it
266 says; that is the entire weight of the package including the contents and the container, wrapper or pail, without deduction; that is gross weight. A sale by net weight of a package or pail means what it says, that is a sale in which the weight of the container pail or wrapper is deducted. In a sale by gross weight, there is no deduction. The weight of the container is included in the total weight. In a net weight sale, the weight of the container is deducted in determining the weight of the article sold. We agree with the

court's statement, folio 89, "While it is just that the consumer pay for the container, it is equally just that he should know how much container he was purchasing and how much lard." It is this principle which authorized the passage of the 1907 law.

The objection to gross weight sales in which the purchaser was not informed as to the net quantity of the contents of the package was removed by the 1907 law, and since that date all package goods, including lard, have been sold in this state by net weight. In this case Prof. Ladd purchased two pounds and six ounces net weight of lard in a tin pail and paid 35 cents for it. There was no indefiniteness about the quantity of his purchase. There have been no short weight sales of lard pails. Short weight means what it says; that is, a deficient weight; lacking in weight; a less weight than the package, pail or article is represented to have. The giving of short weights is a cheat, a deceit and a fraud. A sale either by gross weight or net weight may be a short weight sale. If a seller represents that his gross weight package weighs three pounds, and it weighs but two and one-half pounds, he has sold a short weight package and is guilty of fraud and deceit. If he sells a net weight package representing that it contains three pounds net, when it contains in fact but two and one-half pounds, he sells a short weight package and is guilty of fraud and deceit. But if the seller sells a gross weight package, representing the gross weight to be three pounds, and it actually weighs three pounds, he does not sell a short weight package; and if he sells a net weight package, representing that it contains three pounds net, and it does contain three pounds net, he is not selling a short weight package; so too, if he represents that his package contains two pounds and six ounces net, and it does contain that quantity, he does not sell a short weight package. Whether or not a package sold either at gross weight or net weight is a short weight package, depends upon whether or not it lacks or is deficient in the weight it is represented to have.

267 The evidence is undisputed in this case that there never have been any short weight sales by this defendant, or in the general lard industry, and we deny the accuracy of such information as the court received outside of the record, and used by it in support of these accusations and protest against placing the decision upon this incorrect basis.

VIII.

We also urge as grounds for re-submission of this case that the majority opinion and conclusion is expressly based in part upon matters outside of and independent of the record, which was regularly prepared and submitted to this court as a basis for reviewing the judgment complained of. It appears upon the face of the opinion that one or more of the three members joining in the majority opinion have gathered information outside of the record, which has been used as a basis for the majority opinion, and largely if not entirely control it. At folio 64, the majority, before taking up the discussion of such questions as the court considers announce that "In fact a majority of this court believes the law not only rea-

sonable but necessary and this belief is founded upon the evidence in this case and upon facts of which this court can take judicial cognizance." "The facts" which patently weigh strongly with the court and of which we contend it could not take judicial cognizance, we will now enumerate: At folio 62—"The 1911 law was drafted by Prof. Ladd after twelve years of observation and study." At folios 70 and 71—"Although a large majority of the manufacturers are giving honest weights and honest measures, there are frauds in measures and weights as can be readily ascertained from an examination of the records of the Pure Food Commissioner for North Dakota and those of Dr. Wiley, formerly of the National Pure Food Bureau." Folios 111 and 112.—"During the past two years, the packers have withdrawn from this state with their pails and there is no sign of any great damage to the state; net weight pails are on sale in almost every store in the state. In this city a local establishment has complied with the law and is furnishing the trade with net weight pails at the present time. We do not believe the packers will abandon North Dakota; nor that it would ruin the state if they did. The National Biscuit Company has quietly returned to this field and is selling net weight biscuits at the regular price after a similar threat and a short absence."

268 We protest against this for three reasons: (1) It is improper and not judicial. (2) This outside information is largely and in the most important particulars incorrect and (3) Because the decision of this, a reviewing court, should stand upon the record and not in part upon matter outside of the record, and as to which there has been no hearing accorded the defendant, and the correctness of which we challenge.

There is nothing within the records of this case, or in the public records, nor was it within our knowledge, until this court made the statement, as to who wrote this 1911 law. The writer of it knew, and the court has probably been correctly informed upon that point, but the fact whatever it may be, is outside of the record and is immaterial. It furnishes no reason why this court should abdicate its functions and adopt the opinion of the writer of the law as he understood it or wants it to be or adopt his view as to its reasonableness or as to its interpretation. If that can be done in this case, it can be done in other cases, in which event the meaning of statutes and written instruments including the interpretation and constitutionality thereof would be determined by an appeal not to a court but to the writer of the instrument or of the law. This doctrine, if adopted, would result in destroying the functions of this court as a reviewing court, which is an end to which we are not ready to agree.

The court grounds its assertion that There are frauds in weights and measures, "upon an appeal to the records of Prof. Ladd and Dr. Wiley. These records even if they were competent, are not in evidence. They are wholly outside of the record. Neither the defendant nor his attorneys have seen them, neither have we heard of them until the court refers to them in this opinion. We do not know now what these records are, but we do know that upon the un-

disputed testimony in this case, which was before the court, which was given under oath, that no fraud or deception in the matter of weights or measures has been practiced by the defendant or lard dealers generally. Prof. Ladd is the prosecutor in this case. His information charged us with violating Section 2 of the 1911 law which requires the putting up of lard in even net pound weights. We challenged this part of the law. The testimony showed that all package goods, including lard, was being sold by net weight; that all pails were labeled. Prof. Ladd was present when the case was tried and the testimony offered. If he had in his possession evidence, which would contradict the evidence offered by the defendant, why did he not offer it? The statute, Sub. 5, section 7317 compels us to presume that if he had offered it, it would have been unfavorable to his present contention. We assert that the statement that frauds in weights and measures has been practiced, as applied to the lard industry, is incorrect, and that there is no evidence in Prof. Ladd's or Dr. Wiley's possession, or any other records which will sustain the court's statement, and that there is no such evidence elsewhere. We challenge the statement and protest against it as incorrect and unfair. We protest against the reception of this private and personal information received ex parte and not under oath, and against the statement being used as a basis for a judicial decision. Had the alleged proof, which the court says exists, been offered, it would have been under oath and we would have had the right to cross examine and offer counter evidence. We assert that the evidence of fraud in weights and measures in this state in lard by the packers does not exist. This presents a question of fact. The truth of our statement is within the knowledge of the thousands of retailers of lard in the state and the many more thousands of lard consumers.

So too, the statement at Folio 111 that net weight pails are on sale in almost every store in the state, is based upon information outside of the record, and is incorrect; if by this the court means for sale in net even pound weights. Our investigation shows that this statement is incorrect and the fact that it is incorrect lies within the knowledge of the many retailers and consumers of lard. Neither do we find that the court's statement in the same folio that "In this city a local establishment has complied with the law and is furnishing the trade with net weight pails at the present time" is correct. The opinion does not name the city or the establishment, but the opinion was filed in Bismarck on December 17th, 1913. We have had a careful investigation made and are informed that no net even pound pails are, or have been put up and furnished to retail dealers for sale in Bismarck where the opinion was filed, the only sales being by a few butchers of their own product. We have also had an investigation made of the city of Fargo, where Prof. Ladd resides, and we find that no establishment in that city is putting up for the trade or carrying and selling net even pound pails. One butcher, C. F. Eggert by name, made an attempt to comply with the law of 1911, but found it impracticable to do so, and after putting out one lot of pails, abandoned the effort and has since sold lard only in bulk.

The statement in reference to the National Biscuit Company contains information which is outside of the record and not within our knowledge, and has no relation to this case, or any question involved in it. The irrelevancy of the reference will be seen, however, in the fact that our inquiry is as to lard and lard pails. The National Biscuit Company is not in the lard business and is not affected by the lard pail section. Its objection was to the requirement as to labeling the net weight. The facts on that subject are doubtless within Prof. Ladd's knowledge and keeping. If they had any relevancy in this case, he should have offered them in evidence. The court cannot properly receive them *ex parte* and use them as a basis for its decision. The foregoing facts were gathered outside of the record and were not given under oath. They are mainly and most of them *are* incorrect as we have stated. They are not facts of which the court may take judicial notice, even upon request. See Sections 7318 and 7319. Prof. Ladd was represented at the trial court by Judge Engerud and the State's Attorney. They did not allege these facts and ask the court to take judicial notice of them, neither did counsel representing the state upon appeal, ask the court to take judicial notice of them.

It would seem that inasmuch as the court's decision shows upon its face that it is in part based upon information obtained by members of the court outside of the record and not under oath, and as to facts which the court deems material, and recites in its opinion as persuasive if not controlling, that a re-argument and a re-submission should be ordered by the court. The court has stated facts outside of the record and in fact based its opinion upon these alleged facts. If a jury were to do this, the reviewing tribunal would be required to set aside the verdict without question.

Section 10080, Subdivision 2, Revised Codes of 1905, expressly provides for a new trial "When the jury has received out of court any evidence other than that resulting from a view of the premises, or any communication, document, or paper referring to the case."

It would seem that the rule which protects verdicts of 271 juries from the reception of improper information or communications should also apply to judges when they become arbiters of fact. We therefore urge that for this reason alone, if for no other, the court should set aside this decision and order a re-argument, and make a decision which shall rest upon the record which was regularly settled and submitted as a basis for review.

These are not facts of which the court can take judicial notice either on its own motion or upon request; they are disputable facts and if they are relevant, they should be determined in the regular way and upon hearing from witnesses under oath.

Neither jurors nor judges are permitted to act on private or extra judicial knowledge in deciding cases.

Jones on Evidence, Secs. 133, 134.

State v. Edwards, 19 Mo. 674.

Shafter v. City of Eau Claire, 105 Wis. 239, 81 N. W. 409.

Mayor v. Ripley, 5 La. 121, 25 A. D. 175.

In the case last cited, the court said:

"It has indeed been urged on us that the judges of this court have individual and extrajudicial knowledge that one or two of the parties are dead, and the other a bankrupt. This court never has, never can act on the information of its members in relation to the facts of a case. Its duty is to decide the case on the evidence received in the court below. And we can only give such judgment as the inferior tribunal might have given on the proof adduced to it."

2 Haynes' New Trial and Appeal, (Revised Edition) Sec. 283:

"It is a cardinal principle of appellate practice that the court of review derives its knowledge of the cause from a record made up in the court below * * *. As a matter of course, the Supreme Court can not look outside of the record before it."

See cases cited in note.

IX.

We also ask for a reargument of this case because the court, in reaching its conclusion and in condemning the defendant and generally those engaged in the lard industry, has denied to defendant the presumption, which the legislature has extended to every person.

Even the vilest criminal is entitled to the following presumption contained in Section 7317 Revised Codes of 1905:

- (1) "That a person is innocent of crime or wrong.
- (19) "That private transactions have been fair and regular.
- (33) "That the law has been obeyed."

The defendant was tried and convicted and appeals from a judgment convicting it of selling a pail of lard, which was not in even net pound weight, but was labeled with its true contents. The constitutional question related to the right of the legislature to arbitrarily require lard to be put up and sold in net even pounds. The defendant was not charged with the violation of the 1907 labeling law, but the 1911 law. This statute does not relate to the purity of lard and is not a pure food law. The particular section in question relates to standardization; and yet this court finds the defendant guilty of violating the 1907 law, that is of insufficient labelling, an offense for which it was not tried in the trial court and with which it is not charged in the information. It also finds upon information obtained outside of the record that frauds have been practiced in the lard business, which is contrary to the undisputed evidence in the case, and in the record and concludes that the 1907 law was being violated; that defendant was guilty of such violation; that it has been unfair and dishonest in its dealings. Thus upon information outside of the records, and against the evidence in the case, and upon its own initiative, the majority opinion denies to the defendant the presumption, which the legislature has declared exists in its favor, viz; that it was innocent of crime or wrong, that its sales of lard in this state have been fair and regular, and that not only the defendant but other dealers in lard obeyed the 1907 law.

X.

At folio 39 the majority opinion prefaces its discussion of the constitutional questions with the statement that "the defendant admits the sale within the state of a single pail of lard, which sale was a violation of the 1911 law." This statement is incorrect, and is contradicted by the record. The alleged violation of the 1911 law is challenged by the defendant's demurrer and its first assignment of error; also by each of the other's assignments. We advanced a number of reasons in support of our contention; among these: (1) that the law forbids the putting up of lard in pails of the size specified; this lard was put up in another state. (2) That the state statute is not applicable while the federal protection of the package continues and that this package at the time of the sale was under federal protection. (3) That it was not the purpose of the law properly construed to forbid the selling of lard in any sized pail, provided it is priced and sold by weight or measure.

XI.

The majority opinion in opening its discussion says: (Folio 43) "The lard sold in this instance was not adulterated but misbranded; but the general propositions are identical," and then proceeds at length to cite authorities justifying laws which seek to prevent the adulteration and misbranding of food products. This case does not involve the question of misbranding in any sense, but does involve the question of standardizing the size of lard pails. It is a far cry from statutes justifying laws forbidding the adulteration and misbranding of products, and a law which attempts to fix the size of packages and prohibiting the sale of the article in packages of other sizes. The authorities are therefore not in point and nothing can be found in Thornton on pure food which can be considered a definite authority upon the contention of the state in this case. The 1911 law does not deal with quality or purity. Section 2 requiring lard to be put up in pails containing net even pounds, is not a misbranding statute; and it is this statute that we are charged with violating. We are not charged with selling a pail which was falsely labeled as to quantity. The pail here in question was correctly labeled, that is as to containing 2 pounds and six ounces. Section 3 requires that lard shall be put up in net even pounds, and the court holds that under the statute it must be put up and sold in even pounds, that is bought and sold in even pounds, and cannot be bought and sold in other quantities than even pounds, even though the sale is made at net weight and priced. The statute is clearly a standardizing statute fixing the quantity of lard which can be sold, requiring sales to be made of even pounds, and the court construes it forbids the sale of fractional pounds.

It is the same in principle as a statute which would require all shoes and hats to be sold in even sizes, and prohibit the sale of half quarter or eighth or other sizes; or a statute which would require

274 milk and other liquids to be sold in even pints, quarts or gallons or other arbitrary amounts, and forbidding the purchase and sale in other quantities; or the sale of butter, cheese and similar articles in fixed and arbitrary weights, and prohibiting sales in other quantities; or requiring eggs, apples, oranges and similar articles to be sold in half dozen or dozen lots and prohibiting sales in other quantities; or requiring eggs, apples, oranges and similar articles to be sold in half dozen or dozen lots and prohibiting sales in other quantities or number, when the articles are put up in a container, even though the quantity or number is plainly expressed and made known to the purchaser; and the articles are priced at the time of the sale. The arbitrary and unreasonable character of such requirements are apparent, and yet the principle is the same as applied to lard. No legitimate reason can be given for preventing a person from buying shoes and hats of the size he wants, provided he can pay for them; or buying the quantity of milk, butter, cheese, or the number of apples and oranges, he wants and needs if he can buy them, and no reason can be assigned for legislative interference in such purchases and sale, so long as the articles are price- and sold by number of quantity. This is just as true in reference to lard as it is to butter, cheese, milk, etc. The act of putting lard into pails is in itself not a labeling or branding, and the failure to put up lard in even pounds, as required by section 2 of the law of 1911, is nowhere not even in this act designated as a misbranding.

The court, we respectfully urge, has entirely misunderstood the Tennessee case, which is cited and quoted from at length in the opinion at folios 114 to 122. In support of the majority conclusion, the court says, folio 115 referring to this case: "This is almost identical in principle with the case at bar, * * * this is a well considered case." The Tennessee case is referred to in our brief on pages 67 and 68, as laying down a correct rule in interpreting a statute standardizing packages and in support of the proposition that such statutes are sustainable only when they permit other sales than those prescribed, to-wit: when the articles are "priced and delivered by actual weight or measure." Our contention was, and is, that our statute, if it can be sustained at all, can be sustained only and for the same reason that the Tennessee statute was sustained, to-wit: that it be construed to permit other sales than those prescribed when they are made by actual weight or measure. This controlling feature of the Tennessee decision and statute has apparently escaped the notice of the majority of this court,

275 although the court's opinion, folio 119, quotes the following from the opinion in that case. "It does not prohibit the manufacturers, the wholesaler, or any person from selling meal in any bag or other receptacle, or quantity desired by the seller or consumer when priced or delivered by actual weight or measure. All persons, whether retailers or not may sell it in that way. That statute only applied where it is put up in bags or packages for sale and sold or offered for sale, without being weighed or measured." The majority opinion ignores or rejects the foregoing principle and

places a construction upon our statute which prohibits sales of lard in quantities other than those prescribed even though sold and delivered by actual weight and measure. If the court will apply the principle of the Tennessee case to our statute, it will be compelled to sustain our contention and give it the same construction as in the Tennessee case by which that statute was sustained, namely, that the statute was not arbitrary and therefore void because it permitted other sales to be made when they were made by actual weight or measure.

XII.

At folio 66, the court after referring to the 1907 law which requires net weight labels, and then the law of 1911 in question and our contention that the 1907 law safe-guarded the public against frauds as to quantity, and so far as possible removed the opportunity for fraud, said: "The legislature was not confined to this remedy (the 1907 law). They might repeal it and provide further regulations if they so chose. They had as much right under the police power to require even weights as they had to require the net weight to be printed upon the outside of the pail. This court has no right to interfere with the legislation and say that one measure is superior to the other." We understand the language to mean that the legislature has chosen between two methods of preventing fraud as to the quantity of lard in pails, and that the 1911 legislature being latest in time had the power to select the remedy contained in that act in preference to the 1907 remedy, by labelling, and that it did make this choice and repealed the 1907 act. This, we believe, is incorrect; at least the state did not contend in the lower court and it has not been contended in this court that the 1907 law has been repealed. Certainly there is no express repeal and in fact the

1911 act expressly affirms the continuance of the labelling provisions. This error is also repeated in the syllabus (folio 276) in the following language: "Held that the legislature has primarily the choice of laws regulating weights and the court will not interfere with this choice." This error results in prejudice to us through the failure of the court to treat the 1907 law as fully in force and to indulge the statutory presumption that it is being obeyed. The plain fact is that no choice of remedies has been made. The 1907 law is still in force and must be obeyed. The 1911 law relates to the same subject, to-wit: the prevention of fraud as to quantity, a subject which was fully safe-guarded by the 1907 law.

XIII.

The court is in error also in the following statement (folio 86). (b) "Defendant further claims the law to be unreasonable because it had been its custom and the custom of other packers for over twenty years to use gross weight pails and that it had therefore become a settled right of the trade. We do not believe the argument sound." The defendant has made no such contention. We cited the custom of making such sales and the fact that they had been free from fraudulent practices, to show the familiarity of the purchasing pub-

lic with that method. We have not claimed and do not claim that the sale of gross weight pails without labeling is a settled right. The evidence shows we acquiesced in the labelling law and in fact labeled the net contents of many of our goods even before the law was passed.

XIV.

At folio 91 the opinion states: "(2) The evidence in this case shows that the defendant could comply with the North Dakota law with little or no expense," and calls attention to the fact that defendant furnished even net pound pails to Park & Tilford of New York City, and states in substance that these pails could be used for North Dakota. "At any rate it would be no more expensive to furnish the sovereign state of North Dakota with those pails than it was to supply a private firm." The defendant does not claim that pails, such as the 1911 law arbitrarily requires, cannot be furnished. Its claim is that this can be done only at an added cost of about 1½ cents a pound for the lard sold in such containers. The evidence establishes this without dispute. The reference to the

Park & Tilford pails is unfortunate; this firm are retailers 277 to the residents on Fifth Avenue and Riverside Drive in New York City, undoubtedly, the wealthiest trade in the United States, which requires everything practically to be specially made and they pay for it, and have the money to pay for it. North Dakota has few, if any financial nabobs. Lard offered in North Dakota in pails like those of Park & Tilford's, would find no purchasers; the price would be prohibitive; this was explained at the oral argument to the best of our ability and this is sufficiently shown by the evidence. (See Abst. fols. 266-267.)

XV.

The majority opinion also states at folio 104 that defendant is "charging the expense of the advertising of their general business up to the lard industry." The evidence shows that lard in pails furnished by defendant is at the price of tierce lard and that only the actual cost of the pail and necessary and incidental expense is added. But defendant does receive a benefit in the way of advertising by the putting out of these sanitary and wholesome pails; and the court infers that in some way, because of this we are thus practicing a fraud upon somebody. We cannot understand that there is anything wrong in this. It is a custom of all business concerns to charge advertising to the cost of the operation of the business which is advertised. Can it be that the court intends to condemn legitimate advertising? If so, our newspapers and magazines, which live upon advertising, will have to suspend business. If it is proper to advertise a business and pay for it and charge it up to the cost of operation, is it not legitimate and indeed praiseworthy to advertise economically and without expense to the industry and consequently without expense to the consumer or added cost as the defendant and other packers of lard have done by putting out their lard in sanitary useful pails, which serve as an advertisement for their industry and busi-

ness? Neither can we see how this situation will be changed by the 1911 law. Lard dealers using pails of an arbitrary standard, by using them would get more or less advertising for their lard and other business. If it is illegitimate in one case it will be in the other.

XVI.

We think also, that the majority have erred in trying the defendant for a violation of the 1907 law. The information in this case charges us with an alleged violation of the 1911 law.

The majority opinion convicts the defendant of violating the 1907 law. The 1907 law is set out, folios 28 and 29 of the opinion. At folio 8, the court says: "In the case at bar the defendant has failed in his proof and on the contrary by its own evidence has shown that the law was artfully evaded. * * *." Folio 73. "If they have obeyed the law of 1907, which we do not concede * * *." Folio 75, "approaching still closer the case in hand we inquire whether or not the defendant was obeying the 1907 law; we discuss this with reluctance * * *." Folio 78. "Upon this label there is no net weight as required by the 1907 law (which see) but upon the left and rear of the pail, completely out of sight as it would stand upon a shelf, we find a paper tag about the size of a silver half dollar and placed thereon in analine ink, evidently with a rubber stamp, the words "net weight 2 lbs. 6 oz." in letters about one-eighth of an inch in height and covering three-fourths of an inch in length * * *." "The label is about as liable to come off as it is to stay on. The ink upon this particular label has faded away although the pail in evidence has been kept in the dark vaults of the Cass County court house and of this court until now it is not legible to the naked eye * * *." (Folio 81.) "It is hard to avoid the conclusion that the defendant company prepared those tags to give the least notice possible to the consumers and yet make a showing of complying with the 1907 law." (Folio 85.) "The contention of defendant that it had complied with the 1907 law is unsupported by the evidence."

In reaching this conclusion the court has gone outside of the record and contrary to the record. The court takes this particular pail, two years and three months after it was sold to Prof. Ladd, and from an examination of the label upon it, pronounces a judgment of condemnation. The question as to whether defendant complied with the 1907 law is not in issue and was not litigated. Prof. Ladd, whose business it was to enforce such laws, bought this pail. He made no complaint of mislabelling; no charge has even been made against this defendant, or any other reputable lard dealers, that they had neglected or failed to observe the 1907 law to the satisfaction of Prof. Ladd. With this pail before him, he made no complaint as to the labeling, but filed a complaint, charging a violation of the 1911 law in that it did not contain even net pounds weight; and the information upon which the case was tried, with Prof. Ladd present, purposely and definitely eliminated the question which the court has discussed, and decided by stating on the matter of weight that the label on this pail "expressed the weight

of the lard in pounds and ounces." See information (Abst. p. 8, fol. 21.)

There was no question about the sufficiency of the label until the writer of the majority opinion raised it. Ladd testified that the sticker was there showing the net weight two pounds and six ounces, when he bought it on September 8, 1911. (Ab. folios 27-32). In his testimony he did not complain of the ink or that the label was dim or obscure. This pail was in Ladd's possession until January 9, 1912—four months—when it was offered in evidence, and then continued in the possession of the Cass County Clerk until January 28th, 1913, a period of more than one year, when it was sent up to this court, where it remained for about eleven months, when the court wrote its opinion.

The court has erred in its chemical analysis of the ink used in the label and also as to the manner in which the pail has been kept. Where Ladd kept it for four months and what he did with it, we do not know, but for the year that it was in the custody of the Clerk's office, it was not in a dark vault, as this court states. Cass County has a fireproof court house; the Clerk's records and this exhibit were kept in his record room which is about 25 by 25 feet with eighteen foot ceilings and light walls, and three windows in the East about three by ten or twelve feet. Practically all of the Clerk's record work is done in this room; it is as light as his main office and is as light as the chambers or court room of this court. The court's statement, which is intended to exclude the possibility of fading from exposure so as to produce the present condition of the label is incorrect. Further on November 3, 1913, when this case was submitted, the letters and figures upon the label were visible to the naked eye. The writer of this brief saw them and read them when the pail was in the court room. They were becoming very dim and we do not dispute the statement in the opinion that a month and a half later, they were not visible to the naked eye, but we do say that upon the facts in the record, and the actual facts out of the record, showing that this pail has not been kept in a dark vault, that an injustice is done

280 to the defendant in concluding that we have been guilty of an intentional violation of the 1907 law. The ink used was a high grade oil ink with a Prussian blue basis. The paste used was a weak solution of Sodium silicate.

Further the lard was put up in these pails for sale and the labels were put on for the benefit of the consumers; neither the lard, nor the pails nor the labels were made to be thrown around the office of the food commissioner, county court house and in Supreme Court, with the intent that two years and four months after the pails were packed, that the label, pail or the lard would be even substantially in their original condition. The fact is that lard cannot be kept pure very long. The packers after filling the pails and labeling them expect they will be in the hands of the retail dealers within thirty days, and their guarantee of quality extends only for thirty days beyond this; that is, it is expected that the lard will be actually consumed within sixty days after it is put into the pails. If not used within three to six months, the lard is quite certain to become rancid. From this it appears that the label was entirely adequate for the protection

of consumers for whom the lard was intended, and that had the defendant kept the lard until the label had shown signs of becoming dim, for it was not dim at the trial, it would have been unsalable lard, and the defendant could have been properly prosecuted for selling an unwholesome product at that time.

The defendant respectfully asks that these erroneous and prejudicial statements be corrected, and that the case be tried and determined upon the record and issues presented. We think it is unfair and unjudicial to try and condemn the defendant upon a criminal charge when none has been made, and when the State has eliminated the very question which the court has considered, and especially upon the evidence in part taken outside of the record and shown to be inaccurate; for the court's statement as to the room where this pail was kept in Cass County for more than a year is grossly incorrect and this is known to the hundreds of attorneys and others who use that room and to the many thousands of people who transact business in that court house.

The court in reaching its conclusion (Subdivision 5 fol. 142) that the law in question does not violate the commerce clause of the Federal Constitution, and its conclusion (subdivision 8 vol. 169) 281 that the Federal Food and drug act does not operate upon an article of interstate commerce which has entered the state and the original package has been broken, is founded upon two fundamental errors, which require at least a re-consideration of the court's views upon this question. The court (fol. 147) "Whether or not the sale in this instance was an interstate or intra-state sale becomes important in determining whether the prosecution should be under the federal or the state laws." The court then traces the package from outside of the state into the defendant's warehouse at Fargo, where the crate was broken open and a single pail sold to Prof. Ladd. The court then applies the doctrine of the original package decisions and holds that the pail when sold was exclusively under the jurisdiction of the laws of this state, and that the Federal food and drug act was wholly inoperative at that time because of the breaking of the original package. The court is in error in testing the question by these decisions.

The second error in the majority opinion is that it wholly overlooks the two late decisions of the United States Supreme Court, directly dealing with this question, and holding directly contrary to the views and conclusions in the majority opinion. *Savage vs. Jones* 225 U. S. 501, decided June 7, 1912, and referred to and quoted from in our original brief, (page 45) involved the sale of stock food in Minneapolis to be delivered F. O. B. to the purchasers and consumers in Indiana in the original unbroken package.

The laws of Indiana required such foods to have the ingredients thereof stamped on the package. The vendors of these goods sought to prevent the enforcement of the state act. The United States Supreme Court sustained the state act as against the Federal Pure Food act, holding: (1) That the Indiana act had a real relation to the suitable protection of the people of Indiana and was not, therefore, an unwarranted interference with inter-state commerce and it was

reasonable in its requirements. (2) The court construed the Indiana act in connection with the Federal food and drug act of June 30, 1906, and on page 529 announced the rule that a state act "so far as its affects inter-state commerce, even indirectly and incidentally can have no validity if repugnant to the Federal regulation." The court said as to the Federal act that "the purpose is to keep such articles out of the channels of inter-state commerce, or if they enter such commerce to condemn them while being transported, or when they have reached their destination, provided they remain unloaded, unsold or in unbroken packages (529).

The court ascertained that the Federal act did not require the publication and labeling of ingredients; that in fact congress had not acted upon that subject and that there was, therefore no conflict between the Indiana statute and the Federal act, and because of this absence of conflict, sustained the state law. This decision clearly sustains the paramount of authority of Congress as against state police regulations which conflict in anyway with congressional legislation.

The above case was followed by McDermott vs. the State of Wisconsin, 228 U. S. 115, decided April 7, 1913, and cited and quoted from in our original brief on pages 43 and 44. That case involved shipments of syrup from Illinois to local merchants in Wisconsin for re-sale. The shipments were in boxes with twelve half gallon tin pails in each case. When the shipments were received the wooden boxes were opened and thrown away, and the pails were put upon the shelf for sale. The pails when put upon the shelves bore labels provided for in the Federal Pure Food Act. The Wisconsin law provided for a different kind of label, and also provided that no other label should appear upon the pail. There was then a plain conflict between the State and Federal act, and the question presented was whether the Federal act or the State act was operative after the original package had been received and opened and the pails had been put upon the shelf; which presented a situation like that involved in the case at bar. The Wisconsin Food Commissioner made complaint and secured a conviction of these merchants for violating the State act, the Wisconsin Supreme Court sustained the conviction. (143 Wis. 18). The United States Supreme Court upon appeal reversed this conviction. It was contended in that court by the State of Wisconsin, as this court has held in the majority opinion, that Federal authority over the imported articles and therefore the state's authority was absolute. This contention the court overruled and denied the applicability of the doctrine of the original package decisions. We quote from the syllabus and opinion in that case: "Package, or its equivalent as used in section 7 of the Food and Drugs Act, refers to the immediate container of the article which is intended for the consumption of the public. To limit the requirements of the act to the outside box, which is not seen by the purchasing public, would render nugatory one of the principal provisions of the act. * * *"

"While the enactment by Congress of the food and drugs act does

not prevent the state from making regulations not in conflict therewith to protect its people against fraud or imposition by impure food and drugs." (*Savage vs. Jones*, 225 U. S. 501), the State may not, under the guise of exercising its police power impose burdens upon interstate commerce or enact legislation in conflict with the act of Congress on the subject."

"A state law on a subject within the domain of Congress, must yield to the superior power of Congress to the extent that it interferes with or frustrates the operation of the act of Congress, a state statute is void. * * * As the Federal Food and Drug Acts require articles in inter-state commerce to be properly labeled, a state cannot require a label when properly affixed under that statute to be removed and other labels authorized by its own statute to be affixed to the package containing the article, so long as it remains unsold by the importer, whether it be in the original case or not."

"The doctrine of original packages was not intended to limit the right of Congress when it chose to assert it as has been done in the Food and Drugs Act, to keep the channels of inter-state commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end."

"State legislation cannot impair legislative means provided by Congress in a federal statute for the enforcement thereof." In the above case the court says (page 130) "Congress manifestly is aiming at the contents of the package as it shall reach the consumer, for whose protection the act was primarily passed," and holds that the Federal statute is operative until the inter-state article reaches the consumer, and in the language of the Federal statute is sold.

The majority opinion in this case is in direct conflict with these two decisions and particularly to the case last cited. In the Wisconsin case the original package had been broken and the
284 cans were upon the shelf. Under the doctrine of the majority opinion, the power of Congress over the article had ceased and the state act had become fully operative, so there could be no further conflict or interference with Federal authority. The United States Supreme Court held that this was not correct. That the breaking of the original package did not release the pails from the protection or condemnation of the Federal Act, but that *that* said act followed the article to the consumer, for whose protection the act was passed. The fact that there was in the Wisconsin case an unmistakable conflict between it and the Federal Act makes no difference, for if *if* the contention which was made in that case, and the doctrine which the court has announced in the case at bar, is correct, that is, that Federal Authority ends where the original package is broken, then there would be no conflict because at the time of the alleged sale, the Federal authority had ceased and would have no application. The Supreme Court held the federal act was operative and extended to the consumer for whose protection the act was passed. If the majority of this court will yield their judgment to the paramount authority of the United States Supreme Court, it will be compelled to hold that the condemnation or protection of the Federal Food and Drug Act extended to the pail of

lard in question and followed it to the consumer; and was operative when the pail was sold to Ladd. And if the subject which the state undertakes to regulate is also regulated by the Federal Act, the Federal Act, is paramount and its operation cannot be impaired even incidentally by the state act. The only question which would remain then is whether or not the Federal Act and the state act deal with the same subject and therefore conflict, and upon this there should be no disagreement. The object of the 1911 statute admittedly is to prevent fraud as to quantity; that concededly is its purpose. The subject of the prevention of frauds in the sale of package goods is covered by the Federal Food and Drugs Act. Section 8 of that Act condemned and penalized misbranding and provided that an article was misbranded if the contents are stated in terms of weight or measure, and they are not plainly and correctly stated on the outside of the package. The pail here in question was labeled in a foreign state and shipped into this state with the label upon it. That label stated the contents net 2 pounds and 6 ozs.

285 Under the decisions above referred to if this label was not correct, the can was misbranded under the Federal Statute and the defendant was subject to the penalty of that act and was subject to that penalty when this pail was sold to Prof. Ladd. It seems clear under the decisions referred to that the Federal statute was applicable. The only logical conclusion then which can be reached is that the state statute of 1911 dealing with the same subject could not be applicable. Congress has determined how frauds as to quantity in package goods can best be prevented, and authorized the labeling of them with the true net weight. The original act has been amended so that this provision is now mandatory while before it was optional. The congressional act applied to this pail, however, because defendant had brought itself under the act by labeling the article and putting it into inter-state commerce. Our state 1907 legislature was of the same mind as Congress namely that the labeling of the true net weight was the best and proper method of preventing fraud, as to quantity in the sale of package goods, and provided for labeling according to the congressional act. The 1911 law makes a new and different requirement on the subject of preventing fraud as to quantity and one which conflicts with both the 1907 and the Federal act, and one which prevents sales of lard pails which may lawfully be sold and are permitted by the Federal Food and Drug Act and by the state law of 1907.

Neither of the above cases are referred to or considered in the majority opinion. We had these cases before the court at the oral argument and discussed them at length, and also the Federal statute. We submit that this court should not hand down a final opinion in this case without a reargument and at least giving further and careful consideration to these cases, with which in our judgment this court's opinion is in clear conflict.

XVII.

The majority opinion is also in error at folio 126 in the following: "We find and excellent discourse upon this subject by the

highest court of this land, from which we give a short quotation, as it is a very recent case and practically overrules *Milet v. People*, 117 Ill. 294, which is practically the only case relied upon by the appellants."

Milet v. People, 117 Ill. 294, is cited on page 50 of our original brief along with a very large number of other cases, reviewed 286 on pages 48 to 62 of our brief. Among these are eight decisions of this court, none of which are referred to in the opinion. All of them are cited under the subject of Improper Classification for Legislation. The entire subject of improper classification is disposed of by this court with the general statement that the 1911 law covers lard and lard substitutes. This does not meet our objection, which is that it does not include other package goods when sold under substantially the same conditions. The court does not meet this objection.

XVIII.

The separate opinion of Judge Bruce concurs in the majority opinion. This concurring opinion is based upon the same errors as hereinbefore pointed out. There is, and has been, no controversy in this case, and can be none, as to the correct rule to be applied in determining whether this statute is valid, under the police powers of the state; that is, independent of the question of the alleged interference of the Federal constitution and the act of Congress. Judge Bruce quotes the correct rule (fols. 179-193) from *C. B. & Q. Ry. Co. v. McGuire*, 219 U. S., 563, as follows:

"Where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. * * * If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail."

It is thus seen that two things are essential to sustain an interference with the freedom of contract. The first is a condition 287 of affairs which authorizes an interference of some kinds; second, the act must have a just relation to the protection of the public. The question then is not what principles to apply, but is there a condition which unchanges interference, and has this act any real relation to the purpose in view. We say that the undisputed evidence shows that there is no condition of affairs which authorizes the interference. No short weight pails were being sold. All lard was being sold by net weight; that is, it was all labelled

with the true net weight. And even if it be conceded that there was ground for legislation, the 1907 law had provided a remedy which fully advised the purchasers as to the contents of the pails and changing the size of the pails has no relation whatever to safeguarding the quantity of lard which is inside of them.

Neither the majority opinion or the concurring opinion of Judge Bruce attempt to show wherein or how the changing of the size of the pails has any relation whatever to preventing fraud as to the quantity of lard contained therein. Judge Bruce's opinion, like the majority opinion, wrongly assumes that a "condition of affairs" exists which the evidence shows does not exist; and secondly, it, like the majority opinion, wholly fails to show that standardizing of pails has any relation to the object to be accomplished. These questions must, or at least should be determined by this court. The concurring opinion is also in error when it places the responsibility upon the legislature and Governor. Legislatures and governors make mistakes sometimes. The integrity of the constitution and its guarantees are committed to this court. The constitution is made by the people and is binding upon legislatures and governors and food commissioners and should be binding upon courts. No higher or more sacred duty is committed to appellate judges than that of safe-guarding the provisions and guarantees of the constitution against violations by legislatures and public officers. When a court shrinks from this, it fails in its highest duty.

The concurring opinion at folio 205 states: "It also appears to me that in the case at bar the question of inter-state commerce is not really involved as the original package seems to have been broken." The error in applying the original package de-
288 cisions is the same as we have pointed out in considering the majority opinion, and has resulted from a failure to consider the two controlling United States Supreme Court decisions which were cited in our original brief, namely: *Savage v. Jones*, 225 U. S. 501, decided June 7, 1912; and the later case of *McDermott v. Wisconsin*, 228 U. S. 115, decided April 7, 1913. The concurring opinion refers to *Savage v. Jones* folio 201, as "the most recent case upon the subject and upon which counsel for defendant principally rely."

And again: folio 203. "The case of *Savage v. Jones* is in fact an authority for and not against the state in this case. In it, it is true, the statute of Wisconsin was held invalid, but the statute of Wisconsin forbade the use of the Federal label altogether. * * *

Judge Bruce is mistaken. The most recent case is *McDermott v. Wisconsin*. We had both of these cases before the court and presented them in connection with the Federal statute. *Savage v. Jones* deals with the Indiana statute and not a statute of Wisconsin at all. The original opinion ignores both of these cases. This concurring opinion refers only to *Savage v. Jones* and wholly ignores the later and most important case of *McDermott v. Wisconsin*. It is evident that the arduous duties of the members of the court led to this confusion and omission and prevented them from giving the consideration to these questions, which their importance de-

manded, and to which we were entitled inasmuch as they were regularly raised, briefed and orally argued. We submit that the court, should not, in justice to itself, permit either the original opinion or the statements contained in the concurring opinion to stand. A decision should be rendered which shall be based upon the record, and with which the members of the court can be satisfied.

XIX.

Section 2 of the 1911 law in undertaking to regulate the putting up of lard in even pails interferes with, what must be admitted to be a legitimate business. The testimony shows that lard dealers cannot put up lard in pails conforming to this section without an added expense above that now incurred for their present sized pails. This added expense will average, as the testimony shows without dispute, about one and one-half cents per pound on the contents.

289 Vendors of lard will have to sell their lard and purchasers will have to pay that much additional for pail lard sold in pails conforming to section 2 of this act.

Can any legitimate, and sound reason be given for imposing upon the lard industry and upon lard consumers this additional burden? Two things must concur before the court can sustain a legislative act interfering with a legitimate business. First, there must be either a fraudulent practice or an opportunity for fraud in the business in question, which should be prevented; and second, the attempted regulation must have some reasonable and rational relation to the purpose to be accomplished. It is shown by the undisputed testimony in this case that no fraud has been committed in the lard business. But let it be admitted that there is an opportunity for the practicing of fraud by giving short weight, and that because of this opportunity for fraud, there is sufficient ground for regulation, we still have the second requisite to be met, and that is that the regulation proposed must have a reasonable relation to the purpose to be accomplished, to-wit, the prevention of fraud in quantity. Now, what is the fraud to be prevented? It is not the size of the pail, but it is the putting into the pail a less quantity than should be put in; and the size of the pail has nothing to do with the fraud, which is to be prevented. The fraud if any is on the inside of the pail not on the outside of it. The attorneys in the trial court and the trial judge were not able to explain how and in what way changing the size of the pail would in any degree tend to prevent fraud as to the contents on the inside of the pail. Prof. Ladd has made no explanation of benefits which can accrue to anybody from this act. The Attorney General's Office could find no basis except that contained in the suggestion that housewives and consumers might detect fraud in the contents by looking at the pails and noticing that they were different sizes. The fallacy of this is so apparent that the majority of the court have paid no attention to it, for plainly a dishonest dealer can steal an ounce or two in short weight in a three pound pails as well as he can in a two pound and six ounce pail. This court on its own motion has adopted a reason of

its own, at folio 85. It is this: Referring to the insufficiency of other lard pails. "The purchaser was not able readily to
290 extract the lard from the pail and weigh it; the lard was used from the pail itself in small portions, and the fact that the pail was included in the gross weight might not ordinarily occur to the housewife."

This adds nothing to our inquiry for a legitimate reason to sustain the 1911 law. Everything which has been or can be said in reference to pails heretofore in use is equally applicable to pails described in the 1911 law. Lard from these pails will be taken out in small quantities and it may not occur to the housewife that the weight of the pail is in addition to the even pound weight stamped upon it. The opportunity for fraud is not reduced in any particular by changing the size of the pail and the cost of pail lard is very materially increased by this requirement. How then can this court say that it is not arbitrary and not unreasonable?

This case is important to the defendant; but it is more important to the consumers of lard in this state, for while the dealers are few in number, the consumers run into the thousands. It must be admitted in view of the undisputed evidence that this law will put upon the consumers an added expense for the pail lard they may use of about one and one-half cents (1½) per pound. No object is accomplished by the act except to embarrass lard dealers in readjusting themselves and the imposition of this added burden. It is purely arbitrary and wholly unnecessary and against the public good, and public welfare, for certainly it must be for the public benefit that consumers may have sanitary lard and as cheaply as possible.

We have pointed out in this petition a number of what we consider most vital errors and omissions, resulting as we know, in a grave injustice to this defendant, and we believe to the court itself. Apparently this has resulted from an insufficient consideration of the record briefs and arguments, constitutional provisions statutes and controlling decisions, and the departure from the record and consideration of matters outside the record as a basis for a decision. To the end that these may be corrected and justice done, we respectfully ask that the case be set down for a re-argument.

Respectfully submitted,

WATSON & YOUNG,
ALFRED R. URION,
ABRAM B. STRATTON,

Attorneys for Defendant and Appellant.

291

On the 17th day of February, A. D. 1914, there was filed in this court the following order on petition for re-hearing.

File No. 2503.

Title.

This action coming on to be heard at the December A. D. 1913 term of this Court, at the Supreme Court room, in the City of Bismarck, State of North Dakota;

Present: Burleigh F. Spalding, Chief Justice; Charles J. Fisk, Edward T. Burke, Evan B. Goss and Andrew A. Bruce, Associate Justices, and a petition for a rehearing upon the appeal herein having been filed by appellant and the court having advised thereon, is now here considered, ordered and adjudged, that the petition be and the same is hereby Denied

And it is Further Ordered, That this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this court.

Dated Feb. 16 1914.

By the court.

B. F. SPALDING,
Chief Justice.

[Seal of the Supreme Court of the State of North Dakota.]

Attest:

R. D. HOSKINS, *Clerk.*

STATE OF NORTH DAKOTA,

In the Supreme Court, ss:

The petition for a rehearing upon the appeal in the above entitled case is hereby Denied.

EDWARD T. BURKE,
A. A. BRUCE,
E. B. GOSS,

Judges Supreme Court, State of North Dakota.

On the 17th day of February, A. D. 1914, there was filed in this Court the following opinion on petition for rehearing:

Title.

(On Petition for Rehearing.)

Appellant has filed a petition for rehearing in which he complains that this court has not passed upon the sufficiency of the information. The court had received the impression that this was a friendly suit to determine the constitutionality of the 1911 law and that no ruling was desired upon minor questions. However, we are and always have been satisfied that the amended information states an offense, and the demurrer was properly over-ruled.

The petition for rehearing also complains because the case of McDermott v. Wisconsin, 228 U. S. 115, was not discussed. This

court believes that such decision is not in point. The gist of its ruling is that a state may not exercise its police power in intra-state matters in such a way that it in effect interferes with inter-state commerce. The Illinois manufacturer wished to ship an article from Illinois to Wisconsin and was obliged to use the United States label in order to cross the state line. The minute that he crossed the state line, the Wisconsin law required him to remove the United States label and substitute another. Thus the Wisconsin law, though pretending to regulate local commerce, in effect prohibited commerce from Illinois to Wisconsin. In the case at bar the only hardship imposed upon the foreign shipper is an increase in cost, according to its own evidence, of one and one half cents per pound, upon its lard in pails. This additional expense likewise falls upon a local manufacturer, so that there is no discrimination against the shipper from another state.

We might also state that Professor Ladd knew the exact amount of lard that he was buying, and that he was not deceived in any manner by appellant. On the contrary all the evidence points to the conclusion that the sale, arrest and nominal fine were pursuant to an understanding between the Pure Food Commissioner and the defendant, in order that the law might be tested in the courts.

The petition for rehearing is denied.

EDWARD T. BURKE.

A. A. BRUCE.

E. B. GOSS.

293 Following the filing of the petition for a re-hearing, and upon the denial of the same, the following opinion was filed as a substitute for the majority opinion:

Title.

As early as Chapter 72 S. L. 1899, North Dakota has each year enacted legislation upon the subject of pure foods and honest weights and measures. The 1907 Act provides that every package, bottle or container should bear the true net weight of the product. Chapter 236 S. L. 1911 provides that every article of food or beverage as defined in the statutes of this state shall be sold by weight, measure or numerical count and labeled in accordance with the provisions of the laws of this state; that all weights shall be net, excluding the wrapper or container, and that every lot of lard, lard compound or lard substitute unless sold in bulk shall be put up in pails or containers holding one, three or five pounds net weight or some whole multiple of these numbers and not any fraction thereof. Defendant is a corporation having packing houses in Chicago, Omaha and other large cities, and maintaining a branch establishment in the city of Fargo, N. D., to which its goods are shipped in car load lots to be distributed therefrom. In October, 1911, the State Food Commissioner went to this branch establishment in Fargo and asked to purchase three pounds of lard. He was sold a pail containing two pounds and six ounces. The sale and the resultant

arrest were made to test the constitutionality of the 1911 law. The defendant claimed that the law was unconstitutional for seven reasons, the first reason being subdivided into six parts.

(1) Plaintiff's contention is that the law is unconstitutional because it is arbitrary, unreasonable and not justified under the police powers of the state. (a) It is contended that the 1911 law was unnecessary because the 1907 law providing for the display of
294 net weights was ample to protect the consumer against fraud.

Held, that the legislature has primarily the choice of laws regulating weights and the court will not interfere with this choice. The burden is upon the person attacking the constitutionality of the law to show beyond a reasonable doubt that the constitution has been violated, that in the case at bar the defendant has failed in his proof there being many reasons for the 1911 enactment. (b) It is contended that the law is unreasonable because it interferes with a custom of the lard industry extending over a period of more than thirty years. Held, that this is no objection to the law. The fact that an abuse has existed for thirty years does not foreclose the state from an attempt to regulate the same. (c) It is contended that the law is unreasonable because it imposes an additional expense upon the packers. Held, upon an examination of the evidence, that this contention is not well founded. The defendant is already supplying a private firm with net weight pails that would comply with the laws of North Dakota. No reason is shown why these pails could not be lithographed with the Armour brand and used in North Dakota. (d) It is further urged that the law is unnecessary and unreasonable because in any event the customers are not prejudiced. That they are paying merely the price of bulk lard plus the extra expense of the tin pails. Held, upon an examination of the evidence, that the consumer pays more than the mere cost of the container. This cost includes expensive advertising upon the pail itself and a probable profit to the middlemen upon the cost of the pail as well as of the lard. (e) It is urged that the law is unreasonable as interfering with the regular custom of all trades, it being contended that butchers and grocers include the weight of the paper bag with the goods sold. Held, that even if true it furnishes no reason why laws should not be enacted to regulate the abuse. (f) It is contended that the enforcement of this law will drive the packers to use bulk lard only, to the detriment of the commodity. Held, that from the evidence, the packers never furnished over 40% of the lard to the trade in this state and this defendant furnishes but between 5% and 10% of the lard used, and even should it withdraw from the state it would not materially affect the lard industry. The
295 authorities upon the subject of the control of weights and measures by compelling even weights in containers are collected in the opinion.

(2) The law of 1911 does not interfere with the guaranties of the constitution relative to the right of freedom of contract and the equal protection of the law. Under the police power, the state can interfere with private rights when necessary to protect the public from fraud or the opportunity for fraud. Whatever injury one

particular citizen may suffer is compensated to him by the general protection afforded him against other evils, by such police power.

(3) Said statute does not constitute the taking of property without due process of law.

(4) The claim of appellant that the lard industry is singled out from all articles of food and subjected to regulation is not supported by the evidence in this case. Every article of food or beverage as well as ordinary articles of commerce such as paints, formaldehyde, Paris green, etc., are regulated by the same or similar acts. The 1911 law specifically mentions lard, lard compounds, and lard substitutes and the manner of their regulation in pails, but this is a mere incident of the law. The object of the law is to prevent the opportunity for fraud in the sale of all articles of food.

(5) The claim of the defendant that the law is in violation of the commerce clause of the federal constitution is not sustained. Congress has control of commerce between the several states, with foreign nations and among the Indian tribes, while the states have control over intra-state commerce. The pail of lard sold to the Food Commissioner was shipped into the state in a railway car and was itself contained in a crate containing twenty similar pails. The original package was either the railway car or the crate and had been broken prior to the sale. Thus the sale was a local or intra-state transaction. The cases upon this phase are collected in the opinion.

(6) It is contended by defendant that the act should be given a reasonable interpretation, thus permitting the sale of gross weight pails if labeled with the net weight. Held, that the import of the law is plain and that the construction required by the defendant would result in a repeal of the law by judicial construction which this court will not do.

(7) It is contended that Congress has assumed control of
296 the field of pure foods and weights and therefore the laws of North Dakota upon the subject have become ineffectual. Under the fifth paragraph of this opinion it is held that the sale in question was an intra-state transaction entirely within the control of the state and entirely outside of the control of the United States.

Upon consideration of the whole act it is held that the law is not unreasonable and it in no manner prejudices the defendant and is not in conflict with any of the enumerated provisions of the constitution.

(Syllabus by the Court.)

Appealed from the District Court of Cass County, Pollock, J.

Affirmed.

Arthur W. Fowler, of Fargo, N. D., and Andrew Miller, Attorney General, Alfred Zuger, Assistant Attorney General, and John Carmody, Assistant Attorney General, of Bismarck, N. D., (Edward Engerud, of Fargo, N. D., of Counsel), Attorneys for Respondent.

Watson & Young, of Fargo, N. D., and Alfred R. Urion, of Chicago, Ill., and Abram B. Stratton, of Chicago, Ill., Attorneys for Defendant and Appellant.

Opinion of the Court by Burke, J.

Title.

BURKE, J.:

As early as Chapter 72 Session Laws of 1899, the legislature of the state of North Dakota enacted laws relative to pure foods and honest weights. This legislation covers almost every article of food-beverages; Paris green, paints, formaldehyde, and other articles too numerous to mention. The weight of a bushel of every kind of grain is specified, as well as the size of a gallon, quart, pint, etc., in liquids. The sheriffs of the various counties are given authority to examine and test scales and measures and confiscate those found to be false. Among other subjects regulated is lard. In 1905 an act was passed providing that all articles of food should be considered misbranded if the package, bottle or container did not bear the true net weight, name of the real manufacturer or jobber, and the true grade or class of the product, the same to be expressed in clear and distinct English words in black type on a white background.

297 In 1907 this act was re-enacted with a few changes to read as follows: "If every package, bottle or container does not bear the true net weight, the name of the real manufacturers or jobbers, and the true grade or class of the produce, the same to be expressed on the face of the principal label in clear, distinct English words, in black type, on a white background, said type to be in size uniform with that used to name the brand or producer," the same is to be considered misbranded, etc. This article applied to all food products as well as lard.

Chapter 236 S. L. 1911 reads as follows: (Sec. 1. Food Sold by Weight, Measure or Count.) "Every article of food or beverage as defined in the statutes of this state shall be sold by weight, measure or numerical count and as now generally recognized by trade custom, and shall be labeled in accordance with the provisions of the food and beverage laws of this state. Only those products shall be sold by numerical count which can not well be sold by weight or measure. All weights shall be net, excluding the wrapper or container, and shall be stated in terms of pounds, ounces and grains, Avoirdupois weight, and all measures shall be in terms of gallons of two hundred thirty one cubic inches or fractions thereof, as quarts, pints, and ounces. Reasonable variations shall be submitted and tolerations therefore shall be established and promulgated by the food commissioner. (Sec. 2. Weight of Lard.) Every lot of lard or of lard compound or of lard substitute, unless sold in bulk shall be put up in pails or containers holding one, three or five pounds, net weight, or some whole multiple of these numbers, and not any fraction thereof. If the container be found deficient in weight, additional lard compound or substitute shall be furnished to the purchaser to make up the legal weight. The face label shall show the true name and grade of the product, the true net weight, together with the true name and address of the producer or jobber. If other than leaf lard is used then the label shall show the kind as 'back

lard' or 'intestinal lard.' Every lard substitute or lard compound shall also show in a manner to be prescribed by the food commissioner, the ingredients of which it is composed, and each and every article shall be in conformity with, and further labeled in accordance with the requirements under the food laws of this state. (Sec. 3. Weight of Bread. A loaf of bread shall be two pounds of weight.

Bread, unless composed in chief part of rye or maize, shall be sold only in whole, half and quarter loaves and not otherwise. Bread, when sold, shall upon the request of the buyer, be weighed in his presence and if found deficient in weight additional bread shall be delivered to make up the legal weight, except that this section shall not apply to rolls or to fancy bread weighing less than one quarter of a pound, provided every loaf, half loaf, quarter loaf, or other loaf of bread which does not weigh the full legal weight required by this section when plainly labeled with the exact weight thereof, shall not be deemed in violation of the provisions of this act."

The defendant is a corporation with packing houses in Chicago, Kansas City, Omaha and other large cities, doing a large business in the various lines incident to the packing trade. They maintain a branch establishment in the city of Fargo in this state in charge of a general manager. In October 1911 Professor Ladd, State Food Commissioner, went to this establishment and asked to purchase three pounds of Armour's Shield Lard. He was sold a pail which is one of the exhibits in this case and which admittedly contained two pounds, six ounces of lard. Upon complaint of the food commissioner arrest was made under the provisions of the 1911 law. The purchase was made and the complaint filed with the direct object of testing the constitutionality of the law. The defendant admits the sale within the state, of a single pail of lard, but urges that the law is unconstitutional and void in so far as it attempts to regulate the size of the pail, for six reasons given in the appellant's brief in the following language: "Our contentions still are, and we urge them with all confidence, (1) That this law is arbitrary and unreasonable and can not be justified under the police power of the state. (2) That it interferes with the guaranties of the right of freedom of contract and of the equal protection of the laws afforded by the constitution. (3) That it constitutes the taking of property without due process of law. (4) That it is class legislation. (5) That it is in violation of the commerce clause of the federal constitution and (6) that in no event under proper construction of the statute can a conviction be sustained." We will discuss these objections in the order named.

(1) The first contention is that the law is arbitrary, unreasonable and not justified under the police power of the state. Thereunder appellant has advanced six arguments and we will therefore
 299 subdivide this first subject and discuss each of the reasons given under the designation of a letter of the alphabet. Before taking up those matters in detail a few general remarks may be useful. The lard sold in this instance was not adulterated but misbranded under said statute, but the principles governing are

identical. The questions of pure food and honest weights are inseparably allied and any argument advanced upon one, applies equally to the other. That the subject is well within the police power of the state is so well settled that it seems a waste of time to cite authorities at length, and we will therefore content ourselves with a few citations upon this general proposition. In the excellent work of Thornton on Pure Food and Drugs, section 3, we find: "At this day and age it seems scarcely necessary to cite the ground upon which pure food legislation rests, nor to cite cases in support of it. The right * * * rests upon the police power of the state which remains unimpaired by the federal constitution. * * * It has not only the right, but it is a duty and obligation which the sovereign power owes to the public, and as no one can for-see the emergency or necessity which may call for its exercise it is not an easy matter to prescribe the precise limits within which it may be exercised. * * * (Section 4) For it is a settled doctrine of the courts that as government is organized for the purpose, among others, of preserving the public health and the public morals, it can not divest itself of the power to provide for those objects, and that the Fourteenth Amendment was not *designed* to interfere with the exercise of that power by the States." The same author speaking of the power of the legislature and the courts at section four says: "It is not a part of their (the courts') function to conduct investigations of fact entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove the determination of such questions. The power which the Legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both the power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty and property, * * * yet in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage," quoting from *Lick Company v. Hopkins*, 118 U. S. 370, 30 L. Ed. 226. In *Powell v. Commonwealth*, 127 U. S. 678, 32 L. Ed. 253, (affirming 114 Penn. 265, 7 Atl. 913, 60 Am. Rep. 350, 5 Cent. Rep. 890) it is said: "If all that can be said of this legislation is that it is unwise or unusually oppressive to those manufacturing * * * an article of food, their appeal must be to the legislature or to the ballot box, not to the judiciary. The latter can not interfere without usurping powers committed to another department of the government." See also:

McCray v. United States, 195 U. S. 27, 49 L. Ed. 78;

Walker v. Pennsylvania, 127 U. S. 699, 3 L. Ed. 261;

State v. Schlenker, 122 Ia. 645, 84 N. W. 699; 51 L. R. A. 347;

St. Louis v. Schuler, 190 Mo. 524, 89 S. W. 621, 1 L. R. A. (N. S.) 928;

State v. Layton, 160 Mo. 474, 61 S. W. 171, 62 L. R. A. 163;
 State v. Sherod, 80 Minn. 446, 83 N. W. 417, 50 L. R. A. 660, 81 Am. St. 268;
 Commonwealth v. Evans, 132 Mass. 11;
 People v. Smith, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759;
 Commonwealth v. Waite, 87 Am. Dec. 711;
 Stolz v. Thompson, 44 Minn. 271, 46 N. W. 410;

From State v. Smith, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759, we quote: "When a subject is within that (the police) power, the extent to which it shall be exercised, and the regulations to effect the desired end, are generally wholly in the discretion of the Legislature."

State v. Mrozinski, 59 Minn. 465, 61 N. W. 560, 27 L. R. A. 76;
 Helena v. Dwyer, 64 Ark. 424, 42 S. W. 1071, 39 L. R. A. 263; 62 Am. St. 206;
 Borden's Condensed Milk Co. v. Montclair (N. J. L.), 80 Atl. 30;
 Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643;
 Valentine v. Englewood, 76 N. J. L. 509, 71 Atl. 344, 19 L. R. A. (N. S.) 262;
 Reduction Co. v. Sanitary Works, 199 U. S. 306, 50 L. Ed. 204;
 Gardner v. Michigan, 199 U. S. 325, 27 L. Ed. 1107;
 Laurel Hill Cemetery Co. v. San Francisco, 216 U. S. 358, 54 L. Ed. 515.
 Atlantic City v. Abbot, 73 N. J. L. 381, 62 Atl. 999.

The rights of the courts are thus set forth by the supreme court of Missouri, in *St. Louis v. Liesing*, 190 Mo. 464, 89 S. W. 611, 109 Am. St. 774. "If the article is universally conceded to be so wholesome and innocuous that the court may take judicial notice of it, the legislature under the constitution has no right to absolutely prohibit it; but if there is a dispute as to the fact of its unwholesomeness for food or drink, then the legislature can either regulate or prohibit it. The constitutionality of the law is not to be determined upon a question of fact in each case, but the courts determine for themselves upon the fundamental principles of our constitution that the act of the legislature or municipal assembly is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt." See also *State v. Layton*, 160 Mo. 468, 61 S. W. 171, 62 L. R. A. 163, 83 Am. St. 487; also *Adams v. Milwaukee*, 144 Wis. 371, 129 N. W. 518. From *Thornton on Pure Food and Drugs*, page 18, we quote: "If there be a doubt upon the question, then the court can not substitute its opinion for that of the legislature. In such an instance the opinion of the legislature must be considered right and binding."

See also *Rigbers v. Atlanta*, 7 Ga. App. 411; *Borden v. Montclair* (N. J. L.) 80 Atl. 30.

Keeping in mind then the extraordinary burdens of proof placed upon the defendant in this case in its attack upon this statute, we approach the facts in this case. As early as 1899 the legislature of this state provided for a Food Commissioner and enacted pure food laws. Every session of the legislature since that time has contributed further legislation upon the subject. For nearly fifteen years complaining witness Ladd has been such Pure Food Commissioner and the Agricultural College of this state has maintained a department for the testing of foods and weights and often has had men traveling over the state making purchases and studying the subject of pure foods and honest weights and measures in a scientific and painstaking manner. It is not unreasonable to assume that the 1911 law was drafted by such department after twelve years of observation and study. The expert who drafted the law, the legislature who passed it and the Governor who approved it, all thought necessity existed for such a measure. If we did not agree with all of those, we might well hesitate to say that there was absolutely no doubt upon the question, but in fact a majority of this court believes the law reasonable, and this belief is founded upon the evidence in this case. We will now discuss in order the subdivisions of appellant's first objection to the law.

(a) Appellant contends that Chapter 195 S. L. 1907 was amply sufficient to protect the commerce of the state against fraud and that there was no necessity for the 1911 legislation and the same is therefore void. We can not agree with this proposition. The 1907 law was a re-enactment of the 1905 law with a few amendments and

302 its text will be found earlier in this opinion. It provided that the net weight should be placed upon each package of food. The legislature was not confined to this remedy. They might repeal it and provide further regulations if they so chose. They had as much right under the police power to require even weights as they had to require the net weight to be printed upon the outside of the pail. This court has no right to interfere with legislation and say that one measure is superior to the other. During the last dozen years there has been a decided tendency of manufacturers to pack foods in cans and packages. Improved machinery and improved sanitary conditions have enabled foods to be packed cheaply and safely, therefore conditions have been changing year by year and legislation necessarily must — changed to meet them. The object of all net weight and measure laws is to prevent the opportunity for fraud. See *Freund on Police Powers*, section 274; *Tiedman on Police Power*, section 89; *People v. Wagner*, 49 N. W. 609; *McLean v. Ark.* 211 U. S. 539. It is not material whether the defendant in this case was guilty of fraud in the sale of this particular pail of lard, but was the manner of the preparation of the pail such that the people generally might be defrauded? The consumers do not have to depend upon the honesty of the manufacturer in every case. They are entitled to laws allowing them to ascertain the facts themselves. The honest manufacturers, as

well as the consumers, are entitled to protection from competition with dishonest weights. There was therefore a necessity for some sort of legislation upon this subject in this state. Taking up in particular the lard industry we find from the evidence in this case that the packers as a whole supply but 40% of the lard used in this state, while 60% is supplied by local butchers and the consumers themselves. Defendant has one of the largest of the packing houses, but does not of course supply more than its fair share of the trade dividing with such houses as Swift & Company, Cudahy & Company, and Morris & Company, at least. It is apparent therefore that they represent something less than 10% of the lard industry and if they have obeyed the law of 1907 (which we do not concede) it would not be proof that the other 90% of the industry had likewise obeyed the law. Besides, the defendant sells only to the middlemen and there is no proof that the middlemen who purchased from defendant were obeying the 1907 law. It is thus apparent that the behaviour of the defendant has but a remote bearing upon the necessity for the 1911 regulation. Nor would the fact that

303 the defendant was obeying the 1907 law at the time of the arrest be any proof that it was obeying it at the time of the passage of the 1911 law. In other words, the law was enacted for the protection of the consumer and the conduct of defendant in one sale is only slightly material on the general condition. Approaching still closer to the case in hand we inquire whether or not the defendant was obeying the 1907 law. We discuss this with reluctance, because the defendant is undoubtedly following the trend of the trade of the general packers and it is not in justice to be singled out from the others. Unquestionably, defendant makes a fine grade of lard and much may be said in its favor from a trade standpoint. However, it has forced this argument upon us and we would be remiss in our duty did we not answer it with candor. When Professor Ladd purchased the pail of lard in evidence it bore upon its side a lithographed label in five colors bearing the advertisement of the lard. The words "Armour's Pure Lard" are printed upon this label in letters over a quarter of an inch in height and covering six and three quarters of an inch in length, while the name "Shield" covers four running inches and the small letters stand three eighths of an inch in height and the capitals larger, but upon this label there is no net weight as required by the 1907 law (which see) but upon the left and rear of the pail completely out of sight as it would stand upon a shelf, we find a paper tag about the size of a silver half dollar and placed thereon in aniline ink evidently with a rubber stamp the words "Net Weight, 2 lbs., 6 oz.," in letters about one-eighth of an inch in height and covering three-quarters of an inch in length. The wording upon the paper label is scarcely 10% in size of that used in giving the name of the kind of lard. It is hard to avoid the conclusion that the defendant company prepared those tags to give the least notice possible to the consumer and yet make a showing of complying with the 1907 law. In the face of this showing alone the legislature was amply justified in passing the 1911 act. If it be claimed that this paper tag was a

temporary affair to be used until pails could be manufactured showing the net weight upon the principal label in a permanent form we have merely to turn to the evidence of Mr. Howe, General Manager of the Chicago house where he testifies that those tags had been in use for about six years at the time of the trial and that they were in use ever since the first Pure Food laws were enacted. It
 304 evidently was not the intention of this defendant to use any other designation upon their pails or they would have done so, as they were making thousands of pails every day.

With this conduct of the packers well known to the Food Commissioner and Legislature of this state it was only natural that an effort be made to secure better laws upon the subject. People had been educated to call those one, three, five and ten pound pails, as appears from the testimony of the defendant. Indeed, exhibit B in this case is a bill from Armour & Company to the Aneta Mercantile Company of Aneta, N. D., in which those pails were so designated by the defendant company itself. The purchaser was not able readily to extract the lard from the pail and weigh it. The lard was used from the pail itself in small portions and the fact that the pail was included in the gross weight might not ordinarily occur to the housewife. The contention of the defendant that it had complied with the 1907 law, and that said law was sufficient to protect the consumers, is unsupported by the evidence.

(b) Defendant further claims the law to be unreasonable, because it had been its custom and the custom of the other packers for over twenty years to use gross weight pails and that it had therefore become a settled right of the trade. We do not believe this argument sound. The pails have been in use less than thirty years while the lard industry has existed for many hundreds of years. Questions like this are not settled in a day, nor in thirty years. No reason is given why gross weight pails were used in the beginning. Gross weight is unfair, always has been unfair and always will be unfair. Net weight is fair and just and should eventually predominate. It is hard to believe that the selection of gross weight pails thirty years ago was not an attempt to deceive somebody. Can it be possible that a thirty years' tolerance of an evil forever thereafter forecloses mankind from seeking a remedy? It may be that North Dakota now stands alone in this particular law; twelve years ago it stood alone, or almost alone, upon the entire subject of pure food regulations. Today there is scarcely a state in the union that has not such legislation. Public opinion has forced this legislation and it will force the net weight legislation. Net weight pails may be the rule and not the exception in a very few years. While it is just that the consumer pay for the container it is equally just that he should
 305 know how much container he was purchasing and how much lard.

(c) Defendant next contends that the law is unreasonable because it imposes an additional expense upon the packers in that they must furnish a different sized pail for North Dakota than is supplied to the rest of the states. Much evidence was introduced upon this point but it does not appeal to us for two reasons. (1) There is no reason for

furnishing other states with gross weight pails, and (2) the evidence in this case shows that the defendant could comply with the North Dakota law with little extra expense. Mr. Nichols, superintendent of the defendant's tin shops, was one of the witnesses and upon cross-examination admitted that the firm of Park & Tilford of New York City had insisted upon receiving net weight pails and was being supplied with the same by Armour & Company during all the time of this litigation. He says: "Q. And you make net weight pails for them now? A. Yes, sir. We make and fill them. * * * Q. for how long? A. I don't know, I am sure. A few years." It further appears that those pails were made in the shops of the defendant and that they had full machinery for making the net weight pails and could have made a few more for the North Dakota trade. To be true, the pails made for Park & Tilford are of a slightly different shape than those used under the Armour name and contain Park & Tilford's name upon the label. But we see no reason why the Armour label could not have been placed upon some of those pails for use in North Dakota. A supply of empty pails could be kept at each packing establishment and filled for the North Dakota trade as the orders were received. At any event it would be no more expensive to furnish the sovereign state of North Dakota with those pails than it was to supply a private firm. There is no argument advanced showing extra expense in one case that would not occur in the other. That mail order houses may supply North Dakota patrons with gross weight pails is immaterial. The mail order houses are protected under the provisions of the interstate commerce clause. Our law only applies to sales made within the state of North Dakota.

(d) It is next urged that the law is unreasonable because in any event the consumers are not prejudiced. That they are paying merely the price of tierce lard plus the extra expense of the tin pails, the handling of the lard in such small quantities, and packing
 306 the same. We think this argument fails and again for two reasons. (1) The defendant does not sell to the consumer but to middlemen. Conceding that defendant charges the middlemen merely for the actual cost of pails, we know that the middlemen would expect a profit upon his entire investment, and therefore the consumer would have to pay not the net cost of the container but the middlemen's profit thereon as well. In Exhibit B defendant sold to the Aneta Mercantile Company one case of three pound pails. The case contained twenty pails and the Mercantile Company was charged for sixty pounds of lard at sixteen and seven-eighths cents a pound, or \$10.13. When the Mercantile Company placed these pails upon the counter for sale they naturally added a profit upon the whole amount invested. They had purchased forty-seven and one-half pounds of lard and twelve and one-half pounds of tin and had paid sixteen and seven-eighths cents a pound for the whole. When they sold the same the purchaser would be obliged to pay for the lard with the profit thereon to the Mercantile Company and for the pail with the same profit to the Mercantile Company, and while Armour & Company might have made nothing upon the pail yet the consumer paid a

profit. (2) An analysis of the evidence shows that the defendant company gets something besides the net cost of his pail. The plain pail costs little, but the defendant, seeing an opportunity of a lasting advertisement, has taken advantage of the consumer to advertise his goods at the housewife's expense. Mr. Nichols explaining the manner of the preparation of the pails, says: "They are electro-type plates made of compound, compound filled with electro-type material. * * * There are four operations before it is discharged from the machine. First, the machine changes the tin, puts on one color; revolves, puts on another color, and so on till it gets five colors on, then it discharges it. * * * We have a lithographing press to do the lithographing and lacquering of the bodies, and we have a coating machine. Now, each of those machines has an oven. After it is lithographed and the lacquer, that is the front of the lard can, there—the label is put on and lacquer around the label, it has to go into an oven with 318 degrees to 330 degrees heat, stay in four or five hours according to the atmosphere, sometimes six." The manager of the company testifies that the company gets the benefit of the lasting advertisement free. Analysis of the testimony therefore shows that Armour & Company is charging an expense of the advertising of their
307 general business up to the lard industry. When a twenty pound pail of lard is sold it contains eighteen pounds of lard and two pounds of pail. If the consumer pays twenty five cents a pound he has paid fifty cents for the pail and \$4.50 for the lard. This pail has cost the defendant around four cents for tin and a few cents for the making of the pail, which is done by machinery and very cheaply, and the rest of the charge must be for incidental expenses, including the lithographing, and nobody knows the items thereof. The consumer is entitled to this information and the 1911 law helps to supply it. The policy of all such laws is to make it easy for the purchaser to calculate the price that he is paying for the lard and to detect fraud. As we have said before, it is not a question so much of the intention of one particular packer, but a question of opportunity for fraud. It is hard to conceive of any system offering more opportunities for fraud than the gross weight system. If some dishonest packer should decide that the present pail was too light to stand the strain of commerce and should double the weight of his pail the housewife would pay lard prices for tin and honest packers would find themselves competing with the rascal who was making a 25% profit to which he was not entitled.

(e) It is next urged that the law is unreasonable in that other traders have been using gross weight methods also. For instance, they claim that butchers weigh the paper along with the meat and charge meat prices for the paper. To this we have only to say that if the statement is true, the butcher is dishonest in charging twenty five cents a pound for paper that cost him less than a cent a pound. However, this would not help the defendant. The fact that the butcher may be dishonest in his business does not excuse dishonest methods in other lines, nor render unreasonable laws to regulate them.

(f) The defendant urges that the enforcement of this law will drive the packers to use bulk lard only and that this is unsanitary. This is not in point. The packers have never supplied more than 40% of the trade of this state. During the past two years the packers have withdrawn from this state with their pails and there is no sign of any great damage to the state. We do not believe the packers will abandon North Dakota nor that it would ruin the state if they did.

308 Thus upon complete analysis we find that the 1911 law is not unreasonable, arbitrary or capricious: that it has supplied a necessary piece of legislation and that it has worked no hardship upon the defendant in this case.

We think that we have given reasons enough to sustain our position without reference to the decisions of other states, but upon an examination of all the authorities upon statutes in any way similar we find our position sustained by a large majority of the decisions. True, no state has a law exactly like our net weight lard law, but other states have regulated similar articles, bread, corn meal, tobacco, molasses, etc., generally. We review a few of those cases. The state of Tennessee enacted a law requiring corn meal to be put up in sacks, containing two bushels, one bushel, one-half bushel, one-quarter bushel, or one-eighth bushel respectively, and made it unlawful to pack for sale, or sell, or offer for sale any corn meal in bags of other weights. This is almost identical in principle with the case at bar. This is a well considered case collecting almost all of the authorities. Therefrom we quote: "Legislation for the prevention of fraud in weights and measures, especially in the sale of food and other essentials of life was early enacted in England and is common in all the states. * * * It simply provides that when a certain staple article of food, of universal consumption in this country, is sold in packages, the packages shall contain certain quantities of the article, and that the quality and quantity * * * shall be printed and marked thereon. It is well known that corn meal is generally sold by the bushel, or the fraction of a bushel, and is put in packages purporting to contain such quantities, and the object of the statute is to prevent the giving of short weights in these packages, and the consumers from thus being deceived and defrauded, it is true of small sums, but which on account of the enormous sales, in the opinion of the legislative department is a public evil which should be suppressed. It in no sense deprives the owner of his property, of the power to sell and dispose of it in a fair and honest manner. Nor is the act when properly construed discriminatory. It does not prohibit the manufacturer, the wholesaler, or any person from selling meal in any bag or other
309 receptacle, or quantity, desired by the seller or consumer. when priced and delivered by actual weight or measure. All persons, whether retailers or not, may sell it in that way. The statute only applied where it is put in bags or packages for sale, and sold or offered for sale without being weighed or measured." For the benefit of persons who have not access to this (Tennessee) case

we repeat the authority. *State v. Co-operative Store Co.*, 123 Tenn., 399, 131 S. W. 867, A. & E. Ann. Cases, volume 24, page 248.

People v. Luhrs, 195 N. Y. 377, 89 N. E. 171, 25 L. R. A. (N. S.) 473;

People v. Girard, 145 N. Y. 105, 39 N. E. 823, 45 Am. St. Rep., 595;

People v. Wagner, 86 Mich. 594, 49 N. W. 609, 13 L. R. A. 286, 24 Am. St. Rep. 141;

Squire v. Tellier, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 323;

State v. Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419;

Neas v. Borches, 109 Tenn. 398, 71 S. W. 50, 97 Am. St. Rep., 851;

Lemieux v. Young, 211 U. S. 489, 53 U. S. (L. Ed.) 295.

State v. Fourcade, 45 La. Ann. 717, 13 So. 187, 40 Am. St. Rep. 249;

Butler v. Chambers, 36 Minn. 60, 30 N. W. 308, 1 Am. St. Rep. 638;

Waterbury v. Newton, 50 N. J. L. 534, 14 Atl. 604;

Freund on Police Power, section 275.

We also believe the bread cases, as they are called, are an authority upon this proposition. We will not lengthen this opinion by extracts from those cases but it is sufficient to say that there is not much difference in principle between regulating the weight of a loaf of bread and the contents of a pail of lard. Below is a list of those cases:

Commonwealth v. McArthur, (Mass.) 25 N. E. 836.

Mayor v. Yuille, 3 Ala. 137.

People v. Wagner, (Mich.) 49 N. W. 609; 13 L. R. A. 286.

City of Chicago v. Schmidinger (Ill.) 90 N. E. 369;

State v. McCool, 83 Kans. 428; 111 Pac. 477.

State v. Creamery Co., 83 Kans. 389; 111 Pac. 474.

Also in point, as we think, are the coal cases and particularly *McLean v. State*, 98 S. W. 729, in which the supreme court of Arkansas sustained a law having many features similar to our statute. Upon appeal to the Supreme Court of the United States this case was in all things affirmed. See 211 U. S. 539. We find an excellent discourse upon this subject by the highest court of this land, from which we give a short quotation as it is a very recent case and practically over-rules *Millet v. People*, 117 Ill. 294, which is practically the only case relied upon by the appellants: "Liberty of contract which is protected against hostile state legislation is not universal, but is subject to legislative restrictions in the exercise of the police power of the state. * * * The legislature of the state is primarily the judge of the necessity of exercising the police power and courts will only interfere in case the act exceeds legislative authority; the fact that the court doubts its wisdom or propriety affords no ground for declaring a law unconstitutional or invalid." Also more or less in point, we think, are the shingle cases,

oleomargarine cases, tobacco cases, and others too numerous to mention, but which may be found in a note to the Tennessee cases where the same is reported in A. & Eng. Ann. Cases, Volume 24, (1912 C) at page 251, and running to page 259. The text writer gives a list of the statutes which as he said: "Intend to prevent fraud by prohibiting arbitrary deductions by buyers from the gross weight of particular quantities, has been held to be within the police power of the state and not to interfere unlawfully with the freedom of contract." Further authorities might be given but space forbids.

(2) Taking up the second objection, the defendant claims the law unconstitutional because it interferes with the guaranties of the right of freedom of contract and of the equal protection of the law afforded by the constitution. This contention has been made so often and been so often over-ruled that we will give it but the merest mention. We quote from *Deems v. Baltimore*, 80 Md. —, 30 Atl. 648, 26 L. R. A. 541, as follows: "To justify such interference with private rights, the exercise must have for its immediate object the promotion of the public good, and so far as may be practicable, every effort should be made to reconcile the conflicting rights of the public and the private rights of individuals, at the same time the emergency may be so great and the danger to be averted so eminent, that private rights must yield to the safety of the public. And to await in such cases the delay necessarily incident to ordinary judicial inquiry in the determination of private rights would defeat all together the object and purpose for which the exercise of this salutary power was involved. Whatever injury or inconvenience one may suffer in such cases, he is under the eye of the law compensated by sharing the common benefit resulting from the summary exercise of this power, and which, under the circumstances, was absolutely necessary for the protection of the public." See also *Powell v. Commonwealth*, 114 Penn. 265, *supra*. It thus follows that where the law is a reasonable exercise of the police power that it does not interfere with the guaranties of the right of freedom of contract.

(3) The third contention of the appellant is that the statute constitutes the taking of property without due process of law. 311 Much the same answer can be made to this that has been made in article two. In the case at bar no property has been taken without due process of law.

(4) The fourth claim of appellant is that the 1911 statute is void as class legislation; that lard is singled out from all the articles of food and subjected to restrictions while being prepared for market. To this it need only be said that the law of 1911 as well as many preceding laws, regulated the manner of selling every article of food and beverage. Lard, lard compounds, and lard substitutes being sold largely in pails required a particular regulation not necessary for the regulation of such articles as butter, eggs, milk, and cream. The regulation of the size of the pail is but an incident of the law. The fact that all foods are subject to regulation to prevent the opportunity for deceit, is the main idea of the law. In appellant's brief the argument is made that the 1911 law is discriminatory in that it prescribes no regulations for such articles as crisco, cottolene, vegetole,

it being the contention of defendant that those articles which contain no animal fat are not "substitutes of lard." The witness Fox was placed upon the stand evidently to testify as an expert to this effect but upon cross-examination he admitted that those vegetable compounds are intended to and do take the place of lard and serve as a substitute for lard. The statute in express terms covers lard, lard compounds and lard substitutes, and in our opinion applies as well to crisco and the other vegetable compounds as to lard itself, as those articles are used instead of and as a substitute for lard. There is therefore no discrimination against the lard industry. To the effect that those compounds are lard substitutes, see:

State v. Hanson, 84 Minn. 842, 86 N. W. 768, 54 L. R. A. 468.

State v. Aslesem, 50 Minn. 5, 52 N. W. 220, 36 Am. St. 620.

State v. Snow, 81 Ia. 642, 47 N. W. 777, 11 L. R. A. 355.

Upon the question of class legislation also see, *Powell v. Commonwealth*, 127 U. S. 678, *supra*, from which we quote: "The statute places under the same restrictions and subject to like penalties and burdens, all who manufacture, or sell, or offer to sell, or keep in possession to sell, the articles embraced by this prohibition; thus recognizing and preserving the principle of equality among those engaged in the same business."

(5) The fifth claim of the defendant is that the law is in violation of the commerce clause of the federal constitution. In this 312 we believe that appellant is again mistaken. The power of Congress and the power of the state are two distinct and separate things. Thornton in his excellent work on Pure Food and Drugs says in his preface: "In the last few years great interest has been taken in the subject of pure food. * * * The federal Pure Food and Drug Act of June 30, 1906 has acted as an incentive for state legislation on the subject of foods and drugs. * * * Owing to the complex system of government under which we live, the states were not able to protect their inhabitants as effectually as was necessary or desirable. They had no power over food that entered into interstate commerce until it was too late adequately to protect the consumer. The federal Pure Food and Drug Act of June 30, 1906 is intended to cover all points which the states were not able to reach, and it has been far more efficacious in its provisions than perhaps the law of any state has been for its own citizens. But the federal statute does not by any means reach all instances of adulterated foods and drugs. By far the greatest quantity never passes beyond, and is never intended that it shall pass beyond, the boundaries of the state. Congress cannot regulate the sale of this food. It remains for the state to do so. There have been many statutes enacted by the states to cover this subject, especially since the adoption of the Federal Statute of 1906. There is no state in the Union but what has enacted statutes on the subject of Pure Food and Drugs, and quite a number of them are modeled—at least in part—after this one of 1906."

Whether or not the sale in this instance was an interstate or an intra-state sale becomes important in determining whether the prose-

cution should be under the Federal or the state laws, and for this purpose we refer to the testimony in this case. Mr. Howe, general manager of the Omaha plant, testified that they had a branch office in Fargo, N. D., to which point car load lots were shipped to be later broken up and distributed to the smaller towns of the state. Sales were not made to their customers in car load lots owing to the small size of the local sales. Some of the state of North Dakota was covered from Aberdeen, S. D., in a like manner. Professor Ladd testifies that on the eighth day of September 1911 in the city of Fargo, N. D., he went to the person in charge of the Armour & Company establishment at Fargo and called for three pounds of Armour's Shield Lard.

This was given to him and he paid therefore and took the
 313 same away. At that time the pail was one of a crate of twenty pails which had been crated for convenience in shipping. The manager of the defendant company broke open this crate and took therefrom the single three-pound pail of lard and then and there sold it to Professor Ladd. Under these undisputed facts we are asked to say that the single pail of lard was an interstate shipment and as such coming under the inhibitions of the federal pure food law of 1906, and thereby not a violation of the state law. We find the law upon this point pretty well settled in the courts of the various states and of the United States under the heading of original packages. The cases under this subject are collected in Thornton on Pure Food and Drugs, section 88, and we will but briefly refer to some of the leading cases mentioned by him. Thus in *Austin v. Tennessee*, 179 U. S. 343, 45 L. Ed. 244, 50 L. R. A. 470, 70 Am. St. 703, 48 So. 305, 101 Tenn. 563, it is said: "Original packages are such as are used in bona fide transactions carried on between the manufacturer and wholesale dealer residing in different states" and in *Guckenheimer v. Sellers*, 81 Fed. 997, it is stated: "An original package within the meaning of the law of interstate commerce is a package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped." In *re Harmon*, 43 Federal 372, it was held that where several bottles of whiskey were wrapped in paper and sealed and packed in an uncovered wooden box and shipped from one state to another, that the wooden box was the original package and that the bottles were not. In one instance a merchant from Tennessee purchased from a factory in North Carolina a number of cigarettes in boxes which were shipped to him in small packages containing ten cigarettes. Those packages were piled together upon the floor of the factory in North Carolina and the express company notified to come for them. An employee of the company took a large basket belonging to the company and gathered therein the small individual boxes, put them upon the train, and shipped them into Tennessee. In the latter state there was a law prohibiting the sale of cigarettes. When the packages reached Tennessee the agent of the express company took the basket to the store of the defendant, emptied the packages upon the counter and took away with him the basket. The store-keeper sold some of the cigarettes and was arrested and convicted; he appealed to the supreme court of that state claiming
 314 that each small package of cigarettes was an original package

and an inter-state transaction, making practically the same claim that is made in the case at bar. His conviction being affirmed in the Tennessee court he then sued out a writ of error to the Supreme Court of the United States where the conviction was again affirmed, and the Supreme Court of the United States said: "Original packages are such as are used in bona fide transactions carried on between the manufacturer and wholesale dealer residing in different states; where the size of the package is such as to indicate that it was prepared for the purpose of evading the law of the state to which it was sent, it will not be protected as an original package against the police laws of that state." *Austin v. Tennessee*, supra, also *Cook v. Marshall*, 196 U. S. 261, 49 L. Ed. 471, 104 Am. St. 283, 93 N. W. 372, 119 Ia. 384, where some boxes of cigarettes were shoveled into a car in Missouri and delivered in Iowa in that condition and where a conviction was sustained not only in the state courts but upon appeal to the United States Court. See also, *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. Ed. 223, 30 N. E. 1127, 15 L. R. A. 839 (affirming 156 Mass. 236); and *Crossman v. Lurman*, 192 U. S. 189, 48 L. Ed. 40, (affirming 171 New York 329) which latter cases were decisions upon the law as it existed prior to the enactment of the 1906 United States Law. Thornton says: "From a consideration of all the decisions and upon the basis of common understanding of the words, it seems that an original package within the meaning of the Food and Drug act is a unit complete in itself delivered by the shipper to the carrier, addressed to the consignee, and received by him in the identical condition in which it was sent, without separation of the contents in any manner. This unit may be a hogshead containing 500 bottles of wine, or a single can of tomatoes, or it is a small ounce phial of some drug if shipped to the consignee in that form; and if the consignee sells or gives away any one of the three in the unaltered condition in which he received it, if the contents be adulterated or misbranded, he has violated the Act." Thornton referring of course to the United States act. It follows as a natural conclusion that if he broke the packages and sold one of them and it was misbranded it would be a violation of the state act.

315 The breaking of the original package once, if not twice (car and case), before the sale was made, added the goods to the general property of the state of North Dakota and the subsequent sale was an intra-state transaction and subject alone to the laws of the state of North Dakota. It naturally follows that the defendant is not protected under the commerce clause of the United States Constitution.

(6) We reach now the sixth heading, that in no event under a proper construction of the statute can a conviction be sustained. At the oral argument of this case counsel stated that they had no intention of raising any minor objection to the information nor did they desire a decision which would evade the question of the constitutionality of the law in question, and that under this objection they meant to be considered the following proposition: that the courts should give a reasonable construction to the law and in this instance hold that notwithstanding the wording of the law that it should be

so construed as to permit the sale of any sized pail providing that the net weight were stated thereon. In answer to this we have to say that the wording of the statute is too plain to admit of any such construction. The object of the law was to prevent the opportunity for fraud presented when the pail did not contain an even number of pounds, net weight. Any other construction would effectually wipe out the statute itself. This construction can not be supported by reason or authority and it will not be adopted by this court.

(7) At the time of the oral argument the objection was made to the statute that the Pure Food and Drug Act of June 30, 1906 was an assumption of the entire field by congress and that therefore the laws of North Dakota upon the subject were in effect repealed or rendered inoperative. Under section five we have outlined fully the field of congressional control and the field of state control. Congress can only regulate interstate commerce. The states have exclusive control of intra-state commerce and in the absence of legislation of congress have certain rights of control over inter-state commerce within the boundaries of the state, while Congress is limited to control of "Commerce with foreign nations, among the several states and with the Indian tribes." The assumption by Congress of its authority to regulate the interstate commerce effects nothing excepting the right of the state to control interstate commerce within its
 316 borders and does not in any manner curtail the right of the state to control its own commerce, provided such state control does not incidentally interfere with interstate commerce. It is thus seen that none of the objections raised by the defendant to the validity of chapter 236 S. L. 1911, has any merit and as no other points have been presented to us we must hold that the law is constitutional and the conviction thereunder is accordingly affirmed.

EDWARD T. BURKE.

E. B. GOSS.

A. A. BRUCE.

BRUCE, J. (specially concurring):

I concur in the opinion of Mr. Justice Burke. The relative spheres of the courts and of the legislatures in the matter of the so-called police power control seem now to have been well defined by the courts of the country, and especially by the Supreme Court of the United States. In *Planters' Bank v. Sharp*, (1848) 6 How. 301, 319, we find the following: "It is to be recollected that our legislatures stand in a position demanding often the most favorable construction for their motives in passing laws, and they require a faith rather than hypercritical view of well-intended provisions in them. Those public bodies must be presumed to act from public considerations, being in a high public trust; and when their measures relate to matters of general interest, and can be vindicated under express or justly implied powers, and more especially when they appear intended for improvements, made in the true spirit of the age, or for salutary reform in abuses, the disposition in the judiciary should be strong to uphold them."

In the *Sinking Fund* case, 99 U. S. 718, 25 L. Ed. Page 501, Mr.

Justice Waite, in speaking for the court, said: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree upon the strict observance of this salutary rule." In the case of *Chicago, Burlington & Quincy Ry. Co. v. McGuire*, 219 U. S. 563, 55 L. Ed. 328, the court among other things said: "There is no absolute freedom to do as one wills or contract as one chooses.

317 The guarantee of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. * * * Where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance. "The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail." See also *People v. Smith*, 108 Michigan, 527; *Wenham v. State*, 65 Neb. 394, 1 N. W. 421; *Powell v. Pennsylvania*, 127 U. S. 678; *Holden v. Hardy*, 169 U. S. 366; *People v. Bellett*, (Mich.) 57 N. W. 1004; *State v. Olson* — N. D. —, 144 N. W. 661, 13 Columbia Law Rev. 667. The trend of authority in the United States, indeed, is undoubtedly in support of the proposition that the main question for the courts to determine is whether the subject matter is one over which the legislature can exercise a supervisory control, and that the questions of method and of exigency are ques-

tions which must generally be left for the legislative bodies to decide. If a regulation is within the scope of the legislative power and its purpose is not arbitrary supervision, but the protection of the public, the mere fact that it may be unwise in the opinion of the courts or involve an added expense upon the consuming public is no justification for judicial interference. The main arguments against the provisions of the statute which are now under consideration are that their enforcement might possibly prevent the sale of lard in packages in the State of North Dakota, or might so increase the cost of manufacture that an added price would have to be paid by the consumer. These matters, however, are for legislative and not judicial determination. The legislature is drawn fresh from the people. It has the power to appoint committees to examine and to investigate. It and the governor, who has the power to veto and to prevent the passage of unpopular and unsocial legislation, have determined that the risk of this added expense shall be run, and have determined that the prevention of fraud and of short weights is at the present time the paramount necessity. It is too late to contend that the legislature in the proper case has not the power to provide for the size of packages when that size may have a tendency to prevent a deception in weight. (See cases on size and weight of packages and of bread, etc., cited in the principal opinion.)

The reasoning of counsel for respondent may not appear conclusive to this court, but we cannot say that the legislature was not justified in considering it to be so. "Lard," says counsel for the state, "is a household necessity which is largely used in cooking and baking, and for convenience in handling, as well as for other reasons, it has become a universal and extensive practice to pack lard for sale in pails or containers of convenient size for meeting the requirements of the ordinary householder buying lard. These pails have acquired by usage the designation of 3 pound pails, 5 pound pails and 10 pound pails. The actual net weight of lard they contain depends upon the whim of the manufacturer. The actual amount

of lard in these several pails put up by the defendant is as follows: In 3 pound pail 2 pounds, 6 ounces of lard; in the five pound pail 4 pounds, 2 ounces of lard; in the 10 pound pail 8 pounds, 10 ounces of lard. In the mind of the average buyer, however, the pail contains the number of pounds of lard which its name implies; that is, the 3 pound pail represents 3 pounds, the 5 pound pail represents 5 pounds, etc. In the absence of any law requiring the net weight of the commodity to be disclosed, the manufacturer or merchant has the opportunity to actually and even wilfully deceive as to the actual contents of the package. He may reduce the net weight of the lard or increase the weight of the package; and unless the container is opened and the contents actually weighed the consumer must depend upon the representations of the maker or merchant as to the real amount of lard he is getting. In actual practice the representations of the maker or merchant are accepted and acted upon by the general run of consumers. Nay more—the popular conception as to the quantity of lard is the conception accepted and acted upon by the ordinary buyer; and the maker and merchant

can merely tacitly adopt the popular conception and profit accordingly at the expense of the buying public. In short, they can take advantage of the popular conception as to the quantity of lard and thereby collect without the buyers' actual knowledge the same price for the weight of the package as they get for the contents. As a result of this practice the buying public not only may but actually have been paying large sums for tin and packing which they would not have paid had their attention been specifically directed to what they were doing. * * * Labels disclosing the net weight are not effective in actual practice, because the popular designation of a package will continue to prevail in spite of labels. Then too, labels are oftentimes and in fact generally are unheeded. The ignorant heed them not because they do not understand them. The busy housewife as a rule does not notice them. Then also, labels are easily removed or displaced either by intention or design. * * * The only safeguard to insure the effectiveness of such a law is to standardize the package; that is, to make the net contents correspond with the popular designation of the package. * * * The reason for not permitting fractions of a pound is obvious. If fractions of a pound were permitted, the difference between the size and appearance of two pails of different weights would not be readily discoverable, and hence deception and misrepresentation would be greatly facilitated. For example: It would be difficult without careful examination to see the difference between *and* 320 two and one-half pound pail and a three pound pail." These reasons may not appear conclusive to the court, but we cannot say that the legislature was without reason in considering them.

Nor too is there any force in the contention that the statute in question is in derogation of the interstate powers of the Federal Congress. The most recent cases upon the subject, and upon which counsel for the defendants principally rely, (*Savage v. Jones*, 225 U. S. 501 and *McDermott v. Wisconsin*, 228 U. S. 115.) make it clearly appear that the mere fact that Congress may have passed a so-called Food and Drugs Act, has not tied the hands of the state in the case in question. State statutes in such cases are only invalidated where they interfere with or frustrate the operation of the acts of Congress. It cannot be said that the act in question does this. It is merely supplementary thereto. All that the act of Congress says is that if the weight of the package is given upon the label it shall be the correct weight. The cases of *Savage v. Jones* and *McDermott v. Wisconsin*, in fact, are authority for and not against the state in this case. It is true that in the latter case the statute of Wisconsin was held invalid; but the statute of Wisconsin forbade the use of the federal label altogether. Federal regulations of interstate commerce have perhaps been widely extended, but we do not believe that the courts have yet construed the power so as to take from the states the inherent right of self-protection; nor can we believe that it was ever intended by the framers of our government that the protection of the people of a state from fraud and adulteration should be dependent upon the whim of a federal congress located thousands of miles away, with no knowledge of local conditions, and located in what

the late Justice David J. Brewer has termed the "lobby camp of the world." It also appears to me that in the case at bar the question of interstate commerce is not really involved, as the original packages seems to have been broken.

ANDREW A. BRUCE.

321

Title.

Petition for Writ of Error.

The petition of Armour & Company, a corporation organized under the laws of the State of New Jersey, and defendant in the above entitled action, respectfully shows, as grounds for the issuance of a writ of error in the above entitled action:

That on the 8th day of April, 1913, the District Court of Cass County, Third Judicial District, State of North Dakota, rendered and entered a judgment in the above entitled action in favor of the plaintiff and against it imposing a fine of One Hundred Dollars (\$100.00) and costs for the alleged violation of a statute of this state; that thereafter, pursuant to the statutes of North Dakota, an appeal was taken by it to the Supreme Court of the State of North Dakota, which is the highest court in said state, for the purpose of reviewing the errors alleged to have been committed in said judgment; that thereafter, and on December 17, 1913, said court filed an opinion affirming the judgment of the trial court, and that thereafter pursuant to the statute of said state and the rules of said court a petition for re-hearing was filed by the defendant, which petition for re-hearing was held under advisement until on or about February 19, 1913, on which date said court re-affirmed its former conclusion and affirmed said judgment, and transmitted its remittitur and the records in said case to the District Court of Cass County, aforesaid, affirming said judgment; that in said action, both in the trial court and in the Supreme Court, the defendant claimed certain rights, privileges and immunities under the constitution and statutes of the United States, which said rights, privileges and immunities as claimed were denied and overruled by said Supreme Court in affirming said judgment; and the decision of said court was against the rights, privileges and immunities specially set up and claimed under the constitution and statutes of the United States; that said judgment, upon the filing of the remittitur as aforesaid, became final; and defendant is grieved thereby in that

322 through said judgment and proceedings had prior thereto in this case, certain errors were committed to its prejudice in the denial of the rights, privileges and immunities claimed by it under the Federal constitution and statutes.

Wherefore, Said defendant, Armour & Company, a corporation, prays that a writ of error may issue to the Supreme Court of the United States for the correction of the errors complained of, and that a duly authenticated transcript of the records, proceedings and papers herein may be sent to the United States Supreme Court.

Dated June 4, 1914.

ALFRED R. URION.
ABRAM S. STRATTON.
J. S. WATSON.
N. C. YOUNG.

The foregoing petition for a writ of error was filed in the Supreme Court of the State of North Dakota on the 8th day of June, A. D. 1914.

323

Title.

Assignments of Error.

Comes now the defendant in the above entitled cause, Armour & Company, a corporation, and avers and shows that in the record and proceedings in said cause the Supreme Court of the State of North Dakota erred to the grievous injury and wrong of the defendant herein, and to the prejudice and against the rights of the plaintiff in error, in the following particulars, to-wit:

1. The Supreme Court of the State of North Dakota erred in holding and deciding that Chapter 236, Session Laws of 1911 of the State of North Dakota, is valid. The validity of said act was denied and drawn in question on the record by the defendant on the ground that the provisions thereof were repugnant to the constitution of the United States and in contravention thereof. The said errors are more particularly set forth as follows:

2. The Supreme Court of North Dakota erred in holding and deciding that said act was valid as against a claim regularly set up and urged by the defendant that it violated the due process provision of the Fourteenth Amendment of the Federal Constitution, and abridged the privileges and immunities of the citizens of the United States, and denied the equal protection of the laws guaranteed by said amendment.

3. The Supreme Court of the State of North Dakota erred in sustaining said act as against the claim of the defendant which was regularly set up, that said act violates the freedom of contract guaranteed by Section 1 of the Fourteenth Amendment of the Federal Constitution.

4. The Supreme Court of the State of North Dakota erred in sustaining the validity of said act as against the claim of the defendant that it violated the commerce clause (Article 1, section 8) of the Federal constitution.

324 5. The Supreme Court of the State of North Dakota erred in holding that the information stated a public offense as against defendant's claim that the statute violated the Fourteenth Amendment of the Federal Constitution.

6. The Supreme Court of the State of North Dakota erred in holding that the evidence was sufficient to sustain the verdict of "Guilty" as against defendant's contention that the statute violated the Fourteenth Amendment of the Federal Constitution in this: That it denied the defendant the equal protection of the laws, and the acts penalized were committed outside of the State of North Dakota; and further, that it deprived the defendant of its property without due process of law and denied to it the freedom of contract guaranteed by said amendment, and also violated the commerce clause of the Federal constitution.

7. The Supreme Court of North Dakota erred in overruling the defendant's motion in arrest of judgment as against the defendant's contention (a) that the evidence did not show the defendant was guilty of any public offense; (b) that the information did not state facts sufficient to constitute a public offense; (c) that the statute upon which the prosecution is based was repugnant to the provisions of the fourteenth Amendment of the Constitution of the United States, in that it denied the defendant the equal protection of the laws, and made an act punishable which is committed outside of the state, and deprived the defendant of its liberty and property without due process of law, and it violated the interstate commerce clause of the constitution.

8. The Supreme Court of the State of North Dakota erred in sustaining the judgment of conviction.

Wherefore, For these and other manifest errors appearing in the record, the said Armour & Company, plaintiff in error, prays that the judgment of the said Supreme Court of the State of North Dakota be annulled and set aside and held for naught, and that judgment be rendered for plaintiff in error granting to it its rights under the constitution and laws of the United States, and plaintiff in error also prays for its costs.

Dated May 18, A. D. 1914.

ALFRED R. URION,
ABRAM S. STRATTON,
J. S. WATSON,
N. C. YOUNG,

*Attorneys for Armour & Company, a
Corporation, Plaintiff in Error.*

The foregoing assignments of error were filed in the Supreme Court of the State of North Dakota on the 8th day of June, A. D. 1914.

325 On the 8th day of June, A. D. 1914 there was filed in the Supreme Court of the State of North Dakota the following Allowance of Writ of Error, as prayed for:

Title.

Allowance of Writ.

Comes now Armour & Company, defendant in the above entitled action, on this 5th day of June, 1914, and presents to this court its petition for the allowance of a Writ of Error intended to be urged by it, and praying further that a duly authenticated copy of the transcript, proceedings, records and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such further and other proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court desiring to give petitioner an

opportunity to test in the Supreme Court of the United States the questions therein presented, it is

Ordered, That a Writ of Error be allowed as prayed, the said defendant to give a bond according to law in the sum of Twenty-five hundred (\$2500.) Dollars, which said bond shall operate as a supersedeas.

In testimony whereof, Witness my hand this 5th day of June, A. D. 1914.

B. F. SPALDING,
Chief Justice of the Supreme Court
of the State of North Dakota.

* * * * *

326 & 327 (An undertaking in the sum of \$2,500.00 was filed and approved pursuant to the order of allowance herein.)

328 In the Supreme Court of the United States.

STATE OF NORTH DAKOTA, Defendant in Error,

vs.

ARMOUR AND COMPANY, a Corporation, Plaintiff in Error.

Stipulation as to Printing.

It is hereby stipulated and agreed that the following portions of the transcript, as returned by the Clerk of the State Supreme Court, shall not be printed:

1. Omit the sheriff's return, State's Attorney's request and judge's order on pages 1 and 2 of the transcript.
2. Omit the verification to the information at the bottom of page 3 and substitute the words "Duly verified."
3. Omit the entire order to show cause on page 4 of the transcript.
4. Omit the entire opinion of the judge of the trial court found at pages 7 to 23 of the transcript.
5. Omit page 29 of the transcript, defendant's proposal of statement of case, and page 30, stipulation for settlement of same, and insert in lieu of said two pages the following: "Statement of case covering the proceedings of trial court settled by stipulation."
6. Omit pages 163, 164 and 165 of the transcript and in lieu thereof insert the following: "Thereafter and on October 31, 1912, the defendant appealed to the Supreme Court of the State of North Dakota, and said case was duly certified to said court."
7. Omit pages 326 and 327 of the transcript and in lieu thereof print the following: "An undertaking in the sum of \$2,500.00 was filed and approved pursuant to the order of allowance herein."

8. Insert the title of the case but once and omit subsequent repetitions thereof.

Dated September 25, 1914.

329 & 330

J. S. WATSON,
N. C. YOUNG,
ALFRED R. URION,
ABRAM S. STRATTON,
Attorneys for Plaintiff in Error.
ANDREW MILLER,
ALFRED ZUGER,
JOHN CARMODY,
Attorneys for Defendant in Error.

331 [Endorsed:] File No. 24,388. Supreme Court U. S., October term, 1914. Term No. 644. Armour and Company, Plaintiff in Error, vs. State of North Dakota. Stipulation as to printing record. Filed October 5th, 1914.

Endorsed on cover: File No. 24,388. North Dakota Supreme Court. Term No. 644. Armour & Company, plaintiff in error, vs. The State of North Dakota. Filed October 5th, 1914. File No. 24,388.

No. 258

MADE IN U.S.A.

Supreme Court of the United States

OCTOBER 1914 TERM

ARMOUR AND COMPANY

Plaintiff in Error,

THE STATE OF MICHIGAN

Defendant in Error.

WRIT OF HABEAS CORPUS

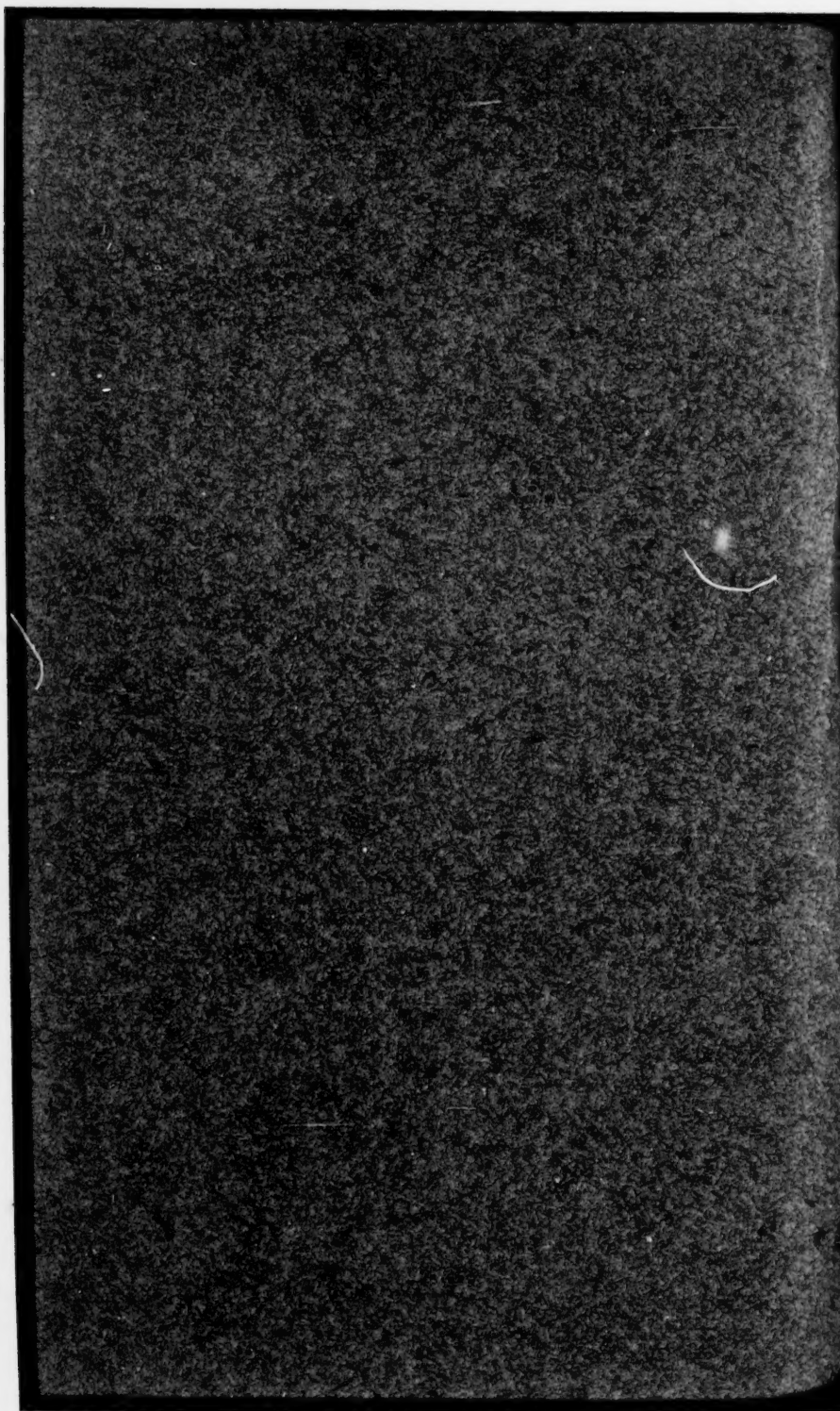
JOHN H. CLARK

JOHN F. CLARK

J. H. CLARK

J. H. CLARK

Attorneys for Plaintiff in Error



INDEX.

	Page.
1. Preliminary statement	1
2. The statute involved.....	2
3. The Information	4
4. The North Dakota original dissenting and re- vised Supreme Court opinion.....	4
5. Assignments of Error.....	6
6. Lard, its production, marketing and use.....	8
7. The transaction in question.....	12
8. Net weight sales laws of North Dakota.....	14
9. Federal Food and Drug Act.....	16
10. Argument	18
11. The statute analyzed	18
12. Section Two void under the 14th Amendment...	21
13. Section Two "arbitrary and has no reasonable re- lation to a purpose which it is competent for the Government to effect".....	26
14. Section Two in this case conflicts with the label- ing provision of the Federal Food and Drug Act	37
15. Bread cases and Tennessee case.....	45
16. Fundamental errors in majority opinion.....	51



Supreme Court of the United States.

OCTOBER, 1914, TERM.

ARMOUR AND COMPANY,

Plaintiff in Error,

VS.

THE STATE OF NORTH DAKOTA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

This is an appeal from a judgment of the Supreme Court of North Dakota affirming a conviction of Armour and Company, the plaintiff in error, of violating Section 2 of Chapter 236, Laws of North Dakota for 1911, which section, as construed and sustained by a majority of the court, requires that sales of lard in that state, when sold in containers, shall be only in even net pounds, and forbids sales in containers in fractional pounds, even though the correct weight thereof is marked thereon, and the same is priced and sold by net weight.

The questions presented here by our assignments of error were raised in the trial court by a demurrer to the information (Tr., p. 5), by a motion in arrest of judgment, (Tr., pp. 7 and 8), by a motion for a new trial (Tr., pp. 6-7), and were presented and reviewed by the state Supreme Court upon appeal (see majority opinion, Tr., pp. 124-147; dissenting opinion, Tr., pp. 147-159; majority opinion denying petition for rehearing, Tr., pp. 191-192; and revised opinion of the majority filed with the denial, Tr., pp. 192-214.)

THE STATUTE INVOLVED.

Chapter 236, Laws of North Dakota for 1911, including the title, reads as follows:

"An Act to Regulate the Manner or Sale of Food Products and Beverages, and Establishing the Legal Weight for Lard Substitutes and for Bread, and Providing a Penalty for the Violation thereof.

Be It Enacted by the Legislative Assembly of the State of North Dakota:

Section 1. (Food sold by Weight, Measure or Count). Every article of food or beverage as defined in the statutes of this state shall be sold by weight, measure or numerical count and as now generally recognized by trade custom, and shall be labeled in accordance with the provisions of the food and beverage laws of this state. Only those products shall be sold by numerical count which cannot well be sold by weight or measure. All weights shall be net, excluding the wrapper or container, and shall be stated in terms of pounds, ounces and grains avoirdupois weight, and all measures shall be in terms of gallons of two hundred and thirty-one (231) cubic inches or fractions thereof, as quarts, pints and ounces. Reasonable variations shall be permitted and tolerations therefor shall be established and promulgated by the food commissioner.

Section 2. (Weight of Lard). Every lot of lard compound or of lard substitute, *unless sold in bulk, shall be put up in pails or other containers holding one (1), three (3), or five (5) pounds net weight, or some whole multiple of these numbers, and not any fractions thereof.* If the container be found deficient in weight additional lard, compound, or substitute, shall be furnished to the purchaser to make up the legal weight. The face label shall show the true name and grade of the product, the true net weight together with the true name and address of the producer or jobber. If other than leaf lard is used then the label shall show the kind, as 'Back Lard,' or 'Intestinal Lard.' Every lard substitute or lard compound shall also show in a manner to be prescribed by the food commissioner, the ingredients of which it is composed, and *each and every article shall be in conformity with, and further labeled in accordance with the requirements under the food laws of this state.*

Section 3. (Weight of Bread). A loaf of bread for sale shall be two pounds in weight. Bread, unless composed in chief parts of rye or maize, shall be sold only in whole, half and quarter loaves and not otherwise. Bread, when sold, shall, upon the request of the buyer, be weighed in his presence and if found deficient in weight additional bread shall be delivered to make up the legal weight, except that this section shall not apply to rolls or to fancy bread weighing less than one-quarter of a pound. *Provided, every loaf, half loaf, quarter loaf or other loaf of bread which does not weigh the full legal weight required by this section when plainly labeled with the exact weight thereof, shall not be deemed in violation of the provisions of this act.*

Section 4. (Penalty for so doing). Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and for the first offense shall be punished by a fine of not less than five dollars (\$5.00) nor more than one hundred dollars (\$100.00) and the necessary costs, and for the second and each subsequent offense he shall be fined not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100.00) or ninety (90) days in jail or both at the discretion of the court."

THE INFORMATION.

Plaintiff in error was charged and convicted of violating Section 2 of the above act.

The information charged that Armour and Company, plaintiff in error, on September 8, 1911, in the City of Fargo, and State of North Dakota, "did wilfully and unlawfully offer for sale and sell to one E. F. Ladd a quantity of lard, and not in bulk, which said lard was then and there put up, sold and delivered to said E. F. Ladd in a pail which then and there held more than two pounds and less than three pounds net weight of lard, to-wit: two pounds and six ounces of lard, and which said pail or container did not then and there have or display on the face label thereof the true net weight of said lard in even pounds or whole multiples thereof, but expressed the weight of the lard in pounds and ounces." (Tr., pp. 4-5.)

E. F. Ladd, the person to whom the sale was made, was, and is, the Pure Food Commissioner of North Dakota.

NORTH DAKOTA ORIGINAL, DISSENTING AND REVISED SUPREME COURT OPINIONS.

Judges Burke, Goss and Bruce, constituting a majority of the state Supreme Court, filed an opinion sustaining the act and the conviction (Tr., pp. 124-143). Judge Bruce also filed a special concurring opinion (Tr., pp. 143-147).

Judge Fisk filed a dissenting opinion, in which Chief Justice Spaulding concurred, holding Section 2 of the act void, and for a reversal of the judgment (Tr., pp. 147-159).

A petition for rehearing and reargument was filed by defendant (Tr., pp. 159-190). This was denied by the

judges who had joined in the majority opinion (Tr., p. 191), and they filed a short opinion in denying the rehearing (Tr., pp. 191-192). In connection with the filing of the opinion denying the petition for rehearing, the majority also filed a revised opinion which is found in the transcript at pages 192 to 210. Judge Bruce also filed a revision of his original concurring opinion (Tr., pp. 210-214).

The original majority opinion and special concurring opinion of Judge Bruce, against which the dissenting opinion of Judge Fisk and Chief Justice Spalding was directed, and to which the petition for rehearing was also directed, were not officially reported or published. The opinions, as reported and published, embrace the revised and corrected opinion of the majority and the concurring opinion of Judge Bruce, all filed with the order denying the petition for rehearing and the dissenting opinion of the minority of the court directed at the unreported original majority opinion. See *State v. Armour and Company*, 27 N. D. 177-224, 145 N. W. 1033.

This statement as to the filing and revising of the majority opinions is necessary to explain the absence of certain statements in the published opinion to which reference is made in the dissenting opinion which, as stated, was written in reference to an opinion which is not published in the official reports in the form in which it was written.

ASSIGNMENTS OF ERROR.

1. The Supreme Court of the State of North Dakota erred in holding and deciding that Chapter 236, Session Laws of 1911 of the State of North Dakota, is valid. The validity of said act was denied and drawn in question on the record by the defendant on the ground that the provisions thereof were repugnant to the constitution of the United States and in contravention thereof. The said errors are more particularly set forth as follows:

2. The Supreme Court of North Dakota erred in holding and deciding that said act was valid as against a claim regularly set up and urged by the defendant that it violated the due process provision of the Fourteenth Amendment of the Federal Constitution, and abridged the ^{to} privileges and immunities of the citizens of the United States, and denied the equal protection of the laws guaranteed by said amendment.

3. The Supreme Court of the State of North Dakota erred in sustaining said act as against the claim of the defendant which was regularly set up, that said act violates the freedom of contract guaranteed by Section 1 of the Fourteenth Amendment of the Federal Constitution.

4. The Supreme Court of the State of North Dakota erred in sustaining the validity of said act as against the claim of the defendant that is violated the commerce clause (Article 1, section 8) of the Federal Constitution.

5. The Supreme Court of the State of North Dakota erred in holding that the information stated a public offense as against defendant's claim that the statute violated the Fourteenth Amendment of the Federal Constitution.

6. The Supreme Court of the State of North Dakota erred in holding that the evidence was sufficient to sustain the verdict of "Guilty" as against defendant's contention that the statute violated the Fourteenth Amendment of the Federal Constitution in this: That it denied the defendant the equal protection of the laws, and the acts penalized were committed outside of the State of North Dakota; and further, that it deprived the defendant of its property without due process of law and denied to it the freedom of contract guaranteed by said amendment, and also violated the commerce clause of the Federal constitution.

7. The Supreme Court of North Dakota erred in overruling the defendant's motion in arrest of judgment as against the defendant's contention (a) that the evidence did not show the defendant was guilty of any public offense; (b) that the information did not state facts sufficient to constitute a public offense; (c) that the statute upon which the prosecution is based was repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States, in that it denied the defendant the equal protection of the laws, and made an act punishable which is committed outside of the state, and deprived the defendant of its liberty and property without due process of law, and it violated the interstate commerce clause of the constitution.

8. The Supreme Court of the State of North Dakota erred in sustaining the judgment of conviction. (Tr., pp. 215, 216).

LARD, ITS PRODUCTION, MARKETING AND USES.

Lard is not used as a food by itself, but only in the preparation of foods. It is a pastry shortening, and cooking fat. It bears the same general relation to foods in domestic economy as seasoning or spices on the one hand and butter and oils on the other. The original shortening and cooking fats were vegetable products, notably olive oil, cocoanut oil, peanut oil, and a considerable number of other similar vegetable oils. Indeed, these oils have always been used in large quantities for these purposes. To them should be added cottonseed oil, which is one of the most popular and commonly used shortening products at the present time. By a process of hardening and bleaching these oils have the general appearance and consistency of lard, and are put up in pails of similar size and shape (Tr., pp. 93-104 and 152).

Aside from the production of lard in the home and retail market, the principal place of supply is the packing establishments. In these establishments lard is a by-product, utilizing the fat of the hog remaining after taking away the portions that commonly go into hams, bacon, pork loins and pork sides. The relative proportion of lard from these various sources at present sold in North Dakota has been estimated at 40% produced by local meat dealers, 20% by consumers and 40% by packing establishments (Tr., pp. 152-153).

Originally lard was sold only in tierces or tubs, a method of sale commonly referred to as in bulk, but early in the industry there arose a demand for small packages of a size suitable for the consumer, and this demand has been supplied by lard in pails. The demand for this style of

package began about the year 1880, and has grown until at the present time about 40% of the lard sold by the defendant in the United States is put up in pails. The advantages of the handling of lard in pails are numerous to the manufacturer, dealer and consumer, namely: (a) The improved keeping and handling qualities of the article both in the store and at home; (b) the protection to the public against carelessness or dishonest tradesmen as to the quantity given; (c) the greatly improved sanitary condition of the product; (d) the preservation of its freshness, wholesomeness and bright appearance which qualities are largely lost by exposure to the atmosphere, and (e) the greater convenience to the merchant in that it is already weighed, and put up, and to the housewife in that it is delivered in a suitable receptacle for keeping the product, which receptacle may be afterwards used for other purposes (Tr., pp. 21, 22, 23 and 153).

In early days all lard was handled by large producers and packers in wooden tierces and barrels, and bulk lard is still handled in that way, a tierce containing 350 pounds and a barrel 230 pounds (Tr., pp. 20-21). This, for obvious reasons, was an unsatisfactory and unsanitary method of handling and distributing the product, especially in small quantities. To remedy this attempts were first made to put up small packages for distribution in paraffine paper containers. These were not satisfactory (Tr., p. 21). They then tried tin containers for small quantities. These proved entirely successful and were adopted by all the packers and have continued in use for thirty years, in 3, 5 and 10 pound gross weight sizes in the form of pails (Tr., pp. 22, 23, 24, 25 and 38).

The size of these pails has continued the same and the net weight of lard contained in them has continued the same (Tr., pp. 38-39), and, from the beginning up to the passage of net weight labelling laws, all sales of pail lard were by gross weight (Tr., pp. 27, 44, 45). There is, and has been, a uniform amount of lard in each pail for they are filled and weighed automatically and then tested as to weight (Tr., p. 39; also p. 86).

Lard, by tierce or barrel, always has been, and still is, sold by net weight (Tr., p. 27).

Each sized pail of each packing company has its own peculiar label (Tr., p. 48), which is a dry, lithographed label put on by means of an electro-type plate made for each sized can and brand (Tr., p. 47). The brand is valuable for advertising, in establishing business and a market, and in guaranteeing the product (Tr., pp. 80, 81, 82). Each packing establishment has its machinery, dies, etc., to make these standard cans of 3, 5 and 10 pound gross weight.

Neither this defendant nor any other packing company or lard producer has ever marketed its product in even net pound pails. The defendant's Chicago plant has, however, for several years, manufactured and filled special, even net pound pails of lard for the firm of "Park & Tilford," of New York (Tr., p. 63). This Park & Tilford pail requires different dies and different machinery from that used to make the standard pail (Tr., p. 64). The equipment and machinery for supplying this New York firm with net weight pails is for their style of pail, not for Armour's style of pail; the machinery and dies are for Park & Tilford's style of pail, not Armour's; there is a difference in the character of the pail, in the form of the

pail. Armour's pail is distinct from the Park & Tilford's pail (Tr., p. 65). The pail furnished to Park & Tilford is their own pail, "that is, their own style of pail" (Tr., p. 66). They have a special set of dies and a special set of electro-type plates for this can of theirs. It is a different shape pail from the Armour pail, and has, of course, "the name 'Park & Tilford' electro-plated on it instead of Armour," and it has colors different from the Armour pail. It is not suitable except for the Park & Tilford trade (Tr., p. 67).

It is needless to say that lard in these sanitary pails costs the packers more than the same quantity would in bulk. Witnesses attempted to estimate the actual added cost caused by the use of these sanitary pails. Their estimate is about $2\frac{1}{4}\text{¢}$ a pound on the lard contained in the pails (Tr., pp. 40-43; 27-28). In marketing lard in these pails, the packers have added to the tierce price of the lard in the pail the estimated extra cost of the pail, and expense connected therewith. The use of these pails by the producers of lard has not been for the direct money profit in the method, but rather for the establishment of their business and the advertising of their products (Tr., pp. 43, 44, 80, 81, 92).

The pails used by the defendant and other lard producers, and known to the trade for twenty-five years or more, cannot be used in marketing lard under the act complained of (Tr., pp. 81-83, 85).

No other state or country on earth requires the marketing of lard in containers in even pounds, so that a change in the size of the pails would be for the North Dakota trade alone (Tr., p. 38). Different machinery, dies, etc., are required to make pails to conform to the North Dakota

law (Tr., p. 64). Witnesses, familiar with the business, estimated the initial cost of making the change for this defendant alone would be \$11,337.46 (Tr., pp. 64, 69). The increase in cost of special North Dakota pails would increase the cost of lard in pails in that state on an average of $1\frac{1}{4}\text{¢}$ per pound (Tr., p. 78). If the pail of lard here in question were made to conform to Section 2 of the act complained of, the same quantity of lard would have cost 39¢ instead of 35¢, which is the price paid for it by Professor Ladd (Tr., p. 78). The burden thus put upon the sale and distribution of lard in North Dakota will necessarily operate to impose a prohibitive price upon lard in pails as compared with lard in bulk, thus resulting in a return to the general use by consumers of the old, unsanitary lard in bulk and the destruction of the valuable trade which the defendant has built up in the sale of its product in the sanitary package; or, to put the proposition differently, it will result in imposing upon the consumers who wish to purchase their lard in pails an added burden of cost without any substantial benefit to them (Tr., pp. 81, 79).

THE TRANSACTION IN QUESTION.

The plaintiff in error has seven or eight packing plants where it produces lard as an incident to its packing business. It has plants at Chicago, East St. Louis, Fort Worth, Kansas City, Sioux City and Omaha. It has no plant in North Dakota, but has a branch establishment in the city of Fargo, in North Dakota, in charge of a local manager.

The pail in question was put up and labeled with its true net weight, 2 pounds and 6 ounces, at the Omaha branch (Tr., pp. 19, 128), and was there crated with similar pails and shipped by plaintiff in error to its distributing house in Fargo, North Dakota. The following summary is quoted from the majority opinion :

"Mr. Howe, general manager of the Omaha plant, testified that they had a branch office in Fargo, North Dakota, to which point carload lots were shipped, to be later broken up and distributed to the smaller towns of the state. Sales were not made to their customers in carload lots owing to the small size of local sales. Some of the state of North Dakota was covered from Aberdeen, South Dakota, in a like manner. Professor Ladd testified that on the 8th day of September, 1911, in the city of Fargo, North Dakota, he went to the person in charge of the Armour & Company establishment at Fargo and called for three pounds of Armour's Shield Lard. This was given to him and he paid therefor and took the same away. At that time the pail was one of a crate of twenty pails which had been crated for convenience in shipping. The manager of the defendant company broke open this crate and took therefrom the single three-pound pail of lard and then and there sold it to Professor Ladd (Tr., pp. 140-141, 208)."

The agent in charge informed Professor Ladd when he called for a three-pound pail that they were selling lard in "small, medium and large" sized pails (Tr., p. 15), and Professor Ladd observed the labeling on the pail expressing its correct net weight at "two pounds and six ounces," when he made the purchase (Tr., pp. 12-13). He paid 35¢ for it (Tr., p. 16) and took a written receipt, Defendant's Exhibit "1" (Tr., pp. 123 and 15). A few days thereafter this prosecution was instituted for a violation of Section 2 of the act above quoted; that is, for selling the Pure Food Commissioner lard in fractional pounds, in a container.

GROSS WEIGHT SALES OF ALL FOOD PRODUCTS IN PACKAGES, INCLUDING LARD IN PAILS, WAS ABOLISHED IN NORTH DAKOTA BY CHAPTER 11, NORTH DAKOTA SESSION LAWS OF 1905, AND CHAPTER 195, NORTH DAKOTA SESSION LAWS OF 1907, AND THE NET WEIGHT METHOD WAS IN FORCE WHEN THE 1911 ACT COMPLAINED OF WAS PASSED.

The legislature of North Dakota at its 1905 session, passed Chapter 11, which was an act amending "An act to prevent the adulteration, misbranding and selling of adulterated and unwholesome foods and beverages * * *." The 1905 act contained the following provisions:

"Section 1. It shall be unlawful for any person, either for himself or while acting as agent or servant of any other person or corporation, to manufacture for sale, sell, offer or to have for sale, to solicit orders for, to store or to deliver, within the state, any article of food or beverage which is unwholesome or adulterated within the meaning of this act."

"Section 2. Any article of food or beverage shall be considered as *unwholesome or adulterated* within the meaning of this act * * *"

Subdivision 9. *If every package, bottle, container, does not bear the true net weight*, the name of the real manufacturer or jobber, and the true grade or class of the product, the same to be expressed in clear and distinct English words in black type on a white background * * *."

Subdivision 9 just quoted was added to the former act by the 1905 amendment under the classification of "Unwholesome or Adulterated Foods."

The 1905 act was followed by Chapter 195 of the Session Laws of 1907, which has continued in force, and in part reads as follows:

"AN ACT to Prevent the Aulteration and Misbranding of Foods and Beverages, the Selling of Adulterat-

ed and Unwholesome Foods and Beverages, and *Providing for the Proper Labeling of All Foods and Beverages.*

Be It Enacted by the Legislative Assembly of the State of North Dakota:

§ 1. (Adulterating and Misbranding Foods and Beverages.) It shall be unlawful for any person, either himself or while acting as agent or servant of any other person or corporation, to manufacture for sale, sell, offer or to have for sale, to solicit orders for, to store or to deliver within the state any article of food or beverage which is unwholesome, misbranded, adulterated or insufficiently labeled within the meaning of this act. The having in possession of such adulterated, unwholesome, misbranded or insufficiently labeled article or articles shall be deemed as prima facie evidence of the violation thereof. For the purpose of this act all condiments, extracts, vinegars, or other substances used in the preparation or compounding of foods or food products and beverages shall be deemed as articles of food.

§ 2. (What Constitutes Adulteration.) Any article of food or beverage shall be considered as *misbranded*, unwholesome, adulterated or *insufficiently labeled* within the meaning of this act: * * *

Ninth. *If every package, bottle or container does not bear the true net weight, the name of the real manufacturer or jobbers, and the true grade or class of the product, the same to be expressed on the face of the principal label in clear and distinct English words in black type on a white background, said type to be in size uniform with that used to name the brand or producer.*" * * *

§ 13. (Emergency). Whereas, an emergency exists in that *the title to the present food law is imperfect, and inadequate protection is afforded against the sale of short weight goods*, therefore this act shall take effect and be in force from and after its passage and approval."

Section 13 just quoted gives the reason for the passage of the 1907 act which is, in substance, a re-enactment of the 1905 law with a broadening of the title by adding:

"Providing for the proper labeling of all Foods and Beverages," so as to cover with certainty the net weight labeling provision contained in the 1905 statute, and heretofore quoted. There was doubt whether the net weight labeling provision was covered by the title of the 1905 statute. The net weight labeling provision was deemed important by the legislature as a protection against short weight sales and the recitals in Section 13, the emergency clause, clearly show that the labeling provision was intended to prevent short weight sales of goods.

FEDERAL FOOD AND DRUG ACT.

As heretofore stated, the pail in question was put up and labeled by the plaintiff in error at its plant at Omaha, Nebraska, and, after being crated with similar pails, it was shipped to the branch house at Fargo where the crate was opened and the pail in question was sold to Pure Food Commissioner Ladd.

The Federal Food and Drug Act of June 30, 1906, Chapter 3915, 34 U. S. Statutes at Large, pages 768-780, then in force, so far as material, was as follows:

Section 2. "That the introduction into any state * * * from any other state * * * of any article of food or drugs which is adulterated or misbranded within the meaning of this act is hereby prohibited, and any person who shall ship or deliver for shipment from any state * * * to any other state * * * or who shall receive in any state * * * * * from any other state * * * and having so received shall deliver in unbroken packages for pay or otherwise, or offer to deliver to any other person any such article so adulterated or misbranded within the meaning of this act, * * * shall be guilty of a misdemeanor and for such offense be fined not exceeding \$200.00 for the first offense and upon con-

viction for each subsequent offense not exceeding \$300.00, or by imprisonment not exceeding one year, or both, in the discretion of the court. * * *."

Section 8. "* * *" that for the purposes of this act an article shall be deemed to be misbranded * * * in the case of food * * *

3d. If in package form and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package."

The label which was put upon the pail in question at the Omaha plant before it started on its interstate journey to Fargo, North Dakota, and which continued on the pail at the time it was sold to Pure Food Commissioner Ladd, and was produced by him at the trial four months later, plainly and correctly stated the contents of the pail as "net weight 2 pounds 6 ounces." The pail was plainly and correctly labeled both under the Federal statute and the state statute. The correctness and sufficiency of the label was admitted by the state and is established by the evidence (Tr., pp. 25, 5, 24, 13, 34) and testimony of Pure Food Commissioner (Tr., p. 13). It is also undisputed, and is affirmatively shown, that the plaintiff in error and other lard dealers have complied with the North Dakota net weight law continuously since it was passed (Tr., pp. 44-45.)

ARGUMENT.

Our contentions are that Section 2 of the act in question which, as construed by the North Dakota Supreme Court, requires lard, when sold in containers, to be put up and sold in even net pounds, and prohibits the sale of lard in containers when not in even net pounds, even though the net contents are plainly and correctly labeled, and the lard is priced and sold by net weight, is (a) arbitrary and unreasonable and cannot be justified under the police power of the state; (b) it interferes with the guaranty of the right of freedom of contract, and (c) it is a denial of the equal protection of the laws afforded by the constitution; (d) it constitutes the taking of property without due process of law, and (e) it is class legislation; all in violation of the Fourteenth Amendment to the Federal constitution, and it also, as applied to the sale here in question, violates Section 8 of Article 1 of the commerce clause of the Federal constitution. These contentions were severally overruled in the majority opinion of the North Dakota Supreme Court.

THE STATUTE IN QUESTION.

Chapter 236, Laws of 1911, which is the act involved, contains three sections. Section 1 provides that every article of food or beverage shall be sold by weight, measure or numerical count and "shall be labeled in accordance with the provisions of the food and beverage laws of the state." This section also provides that only those products shall be sold by numerical count which cannot well be sold by weight or measure; that all weights shall be

net, excluding the wrapper or container, and shall be stated in terms of pounds, ounces and grains avoirdupois and all measures shall be in terms of gallons or fraction thereof, such as quarts, pints and ounces. This section on the subject of net weights and labeling applies generally to all foods and beverages.

The 1905 and 1907 laws established net weights for all package goods. In that respect section one of the 1911 law added nothing to the previous law which required net weights to be stated on package goods and forbade all sale of package goods when the net weight was not so stated.

Section 2 of this act is confined by its terms to lard, lard compounds and lard substitutes, and deals with nothing but lard. The plaintiff in error was convicted of violating this section. This section requires that these products, unless sold in bulk, shall be put up in pails or other containers holding 1, 3 or 5 pounds net weight, or some multiple thereof. It also provides that these products shall be "labeled in accordance with the requirements under the food laws of the state," thus clearly showing that there was no intention on the part of the legislature to substitute the net even pound standardizing provision of this section for the law of 1907, which requires the marking of net weights upon the pails. This section then puts an additional burden upon the lard industry by making it necessary to put up the product in pails of the specified size in addition to complying with the 1907 law which requires the actual net weight of the contents to be put upon the label.

Section 3 establishes a standard size of loaves of bread. This commodity is not required to be marked with the weight under the law of 1907, as that provision of the law

is confined to products put up in packages and loaves of bread are not considered as packages. It will be noted also that Section 3 further provides that loaves of any other size than the standard specified may be sold, provided the weight thereof is plainly shown on the loaf, which is a proper provision and, according to our contention, one necessary for the validity of the section; a proviso, however, which while extended to bread, was denied to the lard industry in Section 2 under the construction placed upon it by the North Dakota Supreme Court.

It is thus seen that Section 2 of this act singles out lard from the entire line of staple grocery and food products which are sold in North Dakota in package form in the same manner as lard and, as construed by the state Supreme Court, requires lard alone, when sold in containers, to be put up and sold in even net pounds. In short, lard, like other food products, must be sold by net weight and must be labeled like other food products, but it must also, when sold in containers, be sold in even net pounds. Our contention is that Section 2 of this statute, as thus construed by the state Supreme Court, is arbitrary and without justification and is void.

The particular thing which, in plain terms, is required by Section 2 of this act is not the selling of lard in net, even pound pails, but is that lard "*shall be put up* in pails or other containers holding one (1), three (3) or five (5) pounds net weight or some whole multiple of these numbers, and not any fractions thereof." It is the putting up of lard in pails of other sizes than those described which is forbidden. The pail here in question was filled, and the lard put up, in another state, namely, in the state of Nebraska. This forbidden act was not done in North

Dakota. We contended in the state court that inasmuch as the act was committed outside of the state the conviction could not be sustained; that it was an act over which the court had no jurisdiction. The state court, in its opinion, construed the statute as applying to sales and sustained the conviction. We submit there is no language in the statute which will authorize such a construction. The legislature did not penalize the selling. The act under which defendant stands convicted is judge-made law, or judicial legislation. We therefore contend that the defendant was convicted without due process of law and in the absence of a statute authorizing the conviction.

SECTION 2 ARBITRARILY AND WITHOUT REASONABLE GROUND THEREFOR, SINGLES OUT LARD FROM ALL FOOD PRODUCTS AND IS THEREFORE VOID UNDER THE 14TH AMENDMENT.

The method of selling food products in packages is general in North Dakota. Section 2 singles out lard from all other products commonly sold in a similar manner in packages. Prints of butter, packages of coffee, boxes of crackers, and the endless number of other products sold in package form are not included, and no natural and reasonable ground for excluding them and in singling out lard has been suggested. To be sure, lard is sold in considerable quantities, but not in as large quantities as many other staple articles of food.

With respect to all of the articles excluded, there is as great an opportunity for fraud and deception as in the case of package lard, and as much or more reason to assume that fraud will be practiced in their sale. There is no natural distinction between these various products

which will justify the inclusion of lard and the exclusion of the others.

A law is not general simply because it bears equally upon all persons to whom it is applicable. A general law must be as broad as its object.

Section 2 of this act arbitrarily includes package lard and requires it to be sold in even net pounds weight when in containers, even though labeled. It arbitrarily excludes all other package goods and does not require them to be sold when in containers in even net pounds. The majority opinion of the state court overruled the contention that the classification was arbitrary, stating that "it is not supported by the evidence in the case. Every article of food or beverage, as well as ordinary articles of commerce such as paints, formaldehyde, Paris green, etc., are regulated by the same or similar acts." In this, the court was in error. The North Dakota *labeling law*, it is true, *applies uniformly* to all the articles referred to, but Section 2 of this act applies only to lard, its compounds and substitutes, and there was and is no other legislative act in North Dakota which requires any other article than lard to be sold in containers by even net pounds.

The principle we invoke was stated in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558-561, from which we quote as follows:

"What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the States will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guar-

antee of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances.' *Missouri v. Lewis*, 101 U. S. 22, 31. We have also said: 'The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; **that no impediment** should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.' *Barbier v. Connolly*, 113 U. S. 27, 31. This language was cited with approval in *Yick Wo. v. Hopkins*, 118 U. S. 356, 369, in which it was also said that 'the equal protection of the laws is a pledge of the protection of equal laws.' In *Hayes v. Missouri*, 120 U. S. 68, 71, we said that the Fourteenth Amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, 'shall be treated alike, under like circumstances and considerations, both in the privileges conferred, and in the limitations imposed.' 'Due process of law and the equal protection of the laws,' this court has said, 'are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.' *Duncan v. Missouri*, 152 U. S. 377, 382. Many other cases in this court are to the like effect.

These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute all except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a State, and agriculturalists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe.

The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * *

But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * *

No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' *Gulf, Colorado and Santa Fe Railway v. Ellis*, 165 U. S. 150, 155,

159, 160, 165. These principles were recognized and applied in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the State, but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws."

On this proposition Judges Fisk and Spaulding gave their views in their dissenting opinion in this case as follows (Tr., pp. 154, 155) :

"Again, is it within the legitimate exercise of legislative power to prescribe, as is attempted to be done in section 2 of the Act, a different classification as to the lard industry from that prescribed for all other industries in sections one and three thereof, the former relating generally to all articles of food and beverages, and the latter specifically relating to bread? By sections one and three no restrictions whatever are placed upon the size of the package. All food products except lard, may be sold in any quantity, provided that the net weight of the contents of such packages, excluding the wrapper, is 'stated in terms of pounds, ounces and grains avoirdupois weight,' or in case of articles sold by measure, is stated in 'terms of gallons of 231 cubic inches or fractions thereof, as quarts, pints and ounces.' And bread is authorized to be sold in whole, half and quarter loaves, and 'when plainly labeled with the exact weight thereof,' may be sold in any size or quantity. In other words, lard is singled out from among all the food products and beverages and placed in a class by itself in so far as the quantity which may be sold in a package is concerned. Why the legislature deemed such a distinction necessary I am wholly at a loss to understand. Neither the majority of the court nor counsel for the state have advanced any reasonable explanation for such discrimination, and I am forced to the conclusion that the attempted classification rests upon no natural or reasonable ground, but is manifestly purely arbitrary and capricious. This appears so palpable

and self-evident to my mind after due reflection, that I have no hesitancy for this reason alone in pronouncing the Act unconstitutional and void upon its face. In *Millett v. The People*, 117 Ill. 294, the court on this question said: 'We recognize fully the rights of the General Assembly, * * * to prescribe weights and measures, and to enforce their uses in proper cases, but we do not think that the General Assembly has power to deny to persons in one kind of business the privilege to contract for labor and to sell their products without regard to weight, while at the same time allowing to persons in all other kinds of business this privilege, there being nothing in the business itself to distinguish it in this respect from any other kind of business.'"

SECTION 2 IS "ARBITRARY AND HAS NO REASONABLE RELATION TO A PURPOSE WHICH IT IS COMPETENT FOR GOVERNMENT TO EFFECT."

We have just considered the capricious and arbitrary singling out of lard from other food products by Section 2 of this act. Now we will consider the capricious, arbitrary, unnecessary and unreasonable way in which it deals with lard, which is the only product to which it applies. The principle by which this act must in part be tested is stated by this court in *Chicago, Burlington & Quincy Railway Co. v. McGuire*, 219 U. S. 563, as follows:

"Where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with the liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to review. * * * If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained. If

such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public, within the scope of legislative power, the act must fail."

Lard is commonly used in the preparation of foods and is a household necessity. The producing and selling of lard is a legitimate business, and it would seem that the development, by the larger lard producers, of the method of putting up lard for domestic use in these small pails, which are sanitary and subsequently useful to the housewife after the lard is removed, should not subject them to adverse criticism. True, the packers have profited by this method through the advertising of their respective brands of lard. Lard consumers have been benefited through being able to obtain wholesome and sanitary lard in useful and durable pails. This method of distributing lard in small quantities has grown because of the demand of consumers for lard put up in this way.

The record shows that these pails have never been used as a means of concealing or practicing fraud as to the quality or quantity of lard contained therein. There has been no juggling either in the size or net contents of the pails. The pails and their net contents have remained the same. These pails, for more than twenty-five years, have been 3, 5 and 10 pound gross weight pails. No representations were ever made that they were 3, 5 and 10 pound net weight pails. Prior to the passage of the net weight labeling law, the net weight of the contents was not stated on the pails, and they were uniformly sold by gross weight, as 3, 5 and 10 pound pails gross, and were so known to the trade. Even before the passage of the net weight labeling and net weight sales laws, fraud as to the net contents was easily discoverable. The gross

weight of the pails was known; they were always of uniform size and weight. Lard is an article of continuous, and not merely occasional, use in the household. Consumers purchase the pails week by week, or month by month, as they need them. The empty pails were always available for weighing. Information as to the net weight of the lard and the weight of the pail could always be obtained by taking the weight of the empty pail from its gross weight, and the comparative price paid could be obtained by comparing the price paid for the net weight in the pail and the price of a corresponding quantity of tierce or bulk lard.

Purchasers of lard have always had the opportunity of buying bulk lard or lard put up in these sanitary pails. Consumers have never been forced to buy pail lard. The lard producers' benefit in this method of distribution consisted substantially in the advertising. There was no fraud and no short weight given. The consumers knew that they were buying gross weight pails, knew the weight of these pails, and knew that the weight of the pail itself was included in the 3, 5 or 10 pounds gross weight.

This was the situation of the lard business in North Dakota when that state passed the net weight labeling and sales laws of 1905 and 1907 which required all food sales in North Dakota to be by net weight. These statutes were general and applied to lard. The lard producers complied with them and labeled their pails with the net weight and thereafter all sales in North Dakota were made by net weight. Even before these acts were passed, anyone desiring to know the net weight of the pails could have easily obtained that information. This information was specifically given upon each pail after the passage of

the 1905 and 1907 laws, so that every sale thereafter made of pail lard was made upon the net weight basis and the assurance was given that the pail contained the net weight thereon stated.

Under these conditions, we contend that the requirement made by Section 2 of this act that all lard sold in containers shall be in even net pound weight is a purely arbitrary requirement, and without reason to sustain it. It is arbitrary because it prevents lard producers, who are engaged in legitimate business, from selling their product in net weight containers and, in this case, in pails which through many years' use have acquired a trade value; arbitrary because without reason it compels the plaintiff in error (and all other packers relatively) to incur an initial expense of \$11,337.46 in changing their machinery so as to make containers for the North Dakota trade of the even pound net weight required by this section; arbitrary because it will add to the present cost of production in putting up pail lard for the State of North Dakota an average of $1\frac{1}{4}\text{¢}$ per pound over what it now costs to put it up in the present pails; arbitrary because it seriously injures the business of lard producers; arbitrary in preventing lard consumers from buying lard in pails of a kind and in a quantity with which they are, from long use, familiar; arbitrary in forcing them to buy lard in pails and in quantities with which they are not familiar; arbitrary in compelling them to buy bulk and unsanitary lard or pay at least $1\frac{1}{4}\text{¢}$ per pound more than they would under the present method of distribution; arbitrary in forcing producers to sell, and consumers to buy, lard in even pounds, and forbidding sales by net weight in packages in any other quantity than even pounds, even

though the buyer and seller may agree, and the net weight is disclosed by label or otherwise; arbitrary in abolishing a custom of marketing lard which for years has had the approval of producers and consumers, and the adoption of a method and standard heretofore unknown to both producers and consumers, and the only justification for which is that it was developed in the experimental laboratory of the North Dakota Pure Food Commissioner.

Section 2 of this statute is as arbitrary as one would be which required all shoes and hats to be sold in even sizes, and prohibited the sale of half, quarter or eighth or other sizes; or a statute which would require milk and other liquids to be sold in even pints, quarts or gallons, or other arbitrary amounts, and forbidding the purchase and sale in other quantities; or a statute requiring the sale of butter, cheese and other similar articles to be in fixed quantities and prohibiting sales in other quantities, or requiring eggs, apples, oranges and other similar articles to be sold in half dozen or dozen lots, and prohibiting sales in other quantities or number even though the quantity or number is plainly expressed and made known to the purchaser, and the articles are priced at the time of sale. The arbitrary and unreasonable character of such requirements is apparent from the mere statement of them, and yet the principle is the same as applied to lard. No legitimate reason can be given for preventing a person from buying shoes and hats of the size he wants, provided he can pay for them, or from buying the quantity of milk, butter, cheese, or the number of apples and oranges, he wants and needs, if he can buy them, and no reason can be assigned for legislative interference in such purchases and sales as long as the articles are priced and sold by number or

quantity. This is just as true in reference to lard as it is to butter, cheese, milk, etc.

Further, Section 2 is not only capriciously arbitrary, but the arbitrary requirement complained of prohibiting the sale of lard in containers in fractional pounds bears no reasonable relation, or any relation, to any purpose which it is competent for the legislature to effect.

The purpose of this act has never yet been definitely stated. We can only speculate as to its purpose. It is competent for the legislature to protect health and to prevent fraud. Manifestly, Section 2 is not a health measure. It has no relation whatever to health. The quantity of lard involved in the sale of a container has no relation to health. Even net pounds of lard in a pail are no more wholesome and healthful than the same lard in fractional pounds would be in the same pail.

The purpose of the act, of course, must be a lawful one. There are statements in the majority opinion of the State Supreme Court which indicate that in their view the purpose of this section was, or may be, to compel lard producers to sell lard in pails at the same price they get for tierce lard, and to furnish the pails free to those who wish to buy lard in containers. This purpose, if it exists, must be rejected for it is an unlawful one in this, that it directly interferes with and destroys the freedom of contract which is guaranteed by the Federal Constitution. If this were the purpose of the act, it would necessarily fall because of its unlawful purpose.

Further, as has been stated, the provisions of Section 2 are not for the protection of health, and it is apparent, and will be conceded, that it is not an inspection law or in aid of inspection or revenue laws. If the requirements

of this section have any legitimate purpose, that purpose must be the prevention of fraud or deception as to quantity in the sale of lard in containers. Here, again, the section fails of justification for it is affirmatively shown in the record that no fraud or deception was being practiced when this law was passed, or ever had been practiced in the sale of lard in containers, so that no conditions existed or ever have existed in the lard business which would justify this arbitrary interference. But, further, and more important still, if we assume that fraud and deception was being practiced, or that it was possible or probable, in selling lard in packages, the section in question has no relation whatever to the prevention of the same.

Fraud and deception may occur in the sale of lard in containers. Necessarily, the deception will relate to the quality of the lard, the quantity thereof, or the price of it. A sale is fair to the purchaser when he knows the quality, quantity and price of the article which he purchases. Section 2 is not aimed at the quality, and quality is not here in question. The other elements of a fair sale were present. The quantity of lard in the container, if not otherwise known to the purchaser, was disclosed by the label which showed the net amount of lard, and the price was disclosed to him when he made his purchase. Further, the purchaser always has had the option of either purchasing lard in the containers or of purchasing bulk lard. We thus see that all of the elements of a fair sale were present.

As we have stated, no fraud or deception has been practiced and when this act was passed, and for several years prior thereto, all lard containers were correctly labeled as to their net contents. An opportunity for fraud, it will be admitted, still exists, notwithstanding the net weight labeling

law, but there can be no giving of short weight unless the pail containing it is falsely labeled as to its net contents. The deception is in the labeling; the shortage in weight in lard is concealed within the pail. There can be no deception as to the pail itself. Consumers are buying a pail with which they are familiar, and can see just what it is. They also know, under the present method of doing business, that they are buying 3, 5 or 10 pound gross weight pails; they know from using them how full these pails should be, and if they do not otherwise know, they know since the passage of the net weight sale and labeling laws how much net weight lard the pails should contain. They see the net weight of the container stated on the label, which is on the outside of the pail. Again, we say that prior to the time of the passage of Section 2 complained of, all of the elements of a fair sale were present in the marketing of lard in containers. There was no fraud to be checked or corrected. If it be said that an opportunity for fraud remained after the passage of the net sale and labeling law which it was competent for the legislature to guard against, it must be found in the danger from incorrect or false labeling of net contents. Here, again, we are met by the fact that no fraud in this respect has been practiced, but it will be admitted that it might occur. Still, this section has no relation whatever to the correction of the suppositious evil of false labeling and consequent short weight sales which would go with it. Changing the size of the container as required by Section 2 accomplishes nothing more than to put a new pail which will hold three pounds net of lard in place of the present pail which will hold two pounds six ounces; that is, it merely substitutes a pail with a different capacity, although it is without dispute

that short weights have never been given by those who are engaged in putting up and selling pail lard. While it is possible that some one might defraud, or attempt to defraud, consumers by putting short weights in these pails, in which event the net weight label on the pail would, of course, be false and fraudulent and the purchaser would be deceived thereby, the fact is that the possibility of deception resulting from such false labeling is greater in the case of pails which are not known to the consumers than with these pails of common use. It is evident, and the fact admits of no argument, that changing the size of the pail accomplishes nothing, and can accomplish nothing, toward checking the possible fraud in giving short weights in these pails. There is no saving virtue in the size or capacity of a tin pail. Short weights may be given in any sized pail. A fraudulent dealer can put less lard in the present pail than his net weight label calls for. He can also, with equal facility, put less lard in the net even pound pail prescribed by Section 2 than his net weight label calls for. He has the same facilities for accomplishing a fraud in either case, and there is no greater difficulty in accomplishing it in one case than in the other. The commission of this deception will depend entirely upon the honesty or dishonesty of the dealer. It probably will be admitted that Section 2 will not reach or control the dealer's conscience.

What we have said is also true as to the change of label which would follow the adoption of Section 2 in question. A pail of lard put out in strict conformity to that act will bear a label of net weight in even pounds. This change in the label likewise accomplishes nothing. A label of three pounds net weight is no more certainly correct and

honest than a label of two pounds 6 ounces net weight put on by the person having the same disposition to deceive. A dishonest dealer can and will just as readily make his three pound net weight label state a falsehood as he can or would a two pound 6 ounce label. It would thus seem that no greater restraint is put upon the producer and seller. Further, no added protection against fraud and deception is given by this section to the consumer. He is just as liable to be deceived through short weights in the new kind of pails as through those in common use when this act was passed, and, as we shall presently see, is more liable to be deceived by the change. The lard which the consumer purchases is on the inside of the pail. He does not see it. He sees the pail and he sees the label. The label may be false on either kind of pail. In the case of the new kind, he has no known standard to go by. The consumer, in making his purchase, must, as to the containers required by Section 2, rely at the time of the sale entirely upon the label. It may be false and the weight may be deficient; unless he takes the lard out of the pail and weighs it, or weighs the pail of lard in gross and then weighs the empty pail, and thus learns the correct net weight, he will not discover the deception. The present 3, 5 and 10 pound gross weight pails in a measure furnish a readier method of discovering short weights, should they be given. These gross weight pails are known to consumers by long use. They know what the gross weight of one of these pails is, and they also know how completely such pails are ordinarily filled. A bare inspection of one of these pails, when opened, would disclose to those constantly using them a shortage, if one existed. At any rate, with these standard pails, but one act is necessary to

determine whether there is short weight; that is, to weigh the pail when it is empty and deduct it from the gross weight. This would disclose the shortage.

No information, then, is given to the consumer by Section 2 as to the truthfulness of the representation as to net contents or quantity of lard in the container. The section merely arbitrarily converts the quantity of lard and container with which producers and consumers are familiar to a quantity and container with which they are not familiar, and compels lard producers to incur an increased expense in producing their lard and to sell it in these new and arbitrary even net pound containers, or not sell lard in containers at all, and it compels the consumers to buy sanitary lard in these new and arbitrary quantities at a necessarily increased cost, or to buy unsanitary lard in bulk. No satisfactory explanation of the purpose of Section 2 of this act has been given, and no reason has been given, or, as we believe, can be given, to justify its provisions. Apparently it has no purpose beyond the accomplishment of the thing which it requires to be done, which is to change the size of lard containers and to compel all sales of lard in containers to be in net even pounds. This, we submit, is not a legitimate or lawful purpose, but is a mere, arbitrary requirement, and, as we have seen, it has no reasonable relation, or any relation, toward the prevention of fraud or deception in the sale of lard which is requisite to sustain it and for these reasons we submit that the section is void under the Fourteenth Amendment.

SECTION TWO OF THE NORTH DAKOTA ACT, AS APPLIED TO THE SALE OF LARD IN QUESTION TO LADD, CONFLICTS WITH THE LABELING PROVISION OF THE FEDERAL FOOD AND DRUG ACT AND THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

We contended in the state court, and also contend here, that Section 2, as construed by the North Dakota Supreme Court, and applied to the sale here in question; that is, to a sale of a pail of lard labeled so as to comply with the Federal Food and Drug Act, and taken from the crate in which it had been shipped and sold by the importer to the Pure Food Commissioner, conflicts with the Federal Food and Drug Act. This contention is based upon the interpretation and application of the Federal act by this court in *Savage v. Jones*, 225 U. S., 501, and *McDermott v. State of Wisconsin*, 228 U. S. 115.

The facts in the case of *Savage v. Jones* were these: Savage had for many years manufactured in the State of Minnesota a medical preparation called "International Stock Food," which was sold and distributed in package form in various states, including the state of Indiana. The State of Indiana had a statute which forbade the sale of such articles unless the ingredients thereof were stated on the package. The Federal Food and Drug act did not require a statement of the ingredients, and was silent on that subject. The Indiana state chemist, to whom the authority for the enforcement of the statute was committed, notified Savage that he would have to state the ingredients of the "International Stock Food" upon the packages, and that if this were not done he would prosecute criminally all persons in Indiana dealing in this article.

Savage's action was to restrain the state chemist of Indiana from proceeding to enforce the Indiana act as applied to his product. This court held that the action was maintainable. We quote the following from the court's opinion (pp. 520, 521) :

"It clearly appears from the bill that the complainant was engaged in dealing with purchasers in another state. His product manufactured in Minnesota was, in pursuance of his contracts of sale, to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce, in the freedom of which from any unconstitutional burden the complainant had a direct interest. The protection accorded to this commerce by the Federal Constitution extended to the sale by the receiver of the goods in the original packages. *Leisy v. Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545, 559, 560; *Plumley v. Massachusetts*, 155 U. S. 461, 473; *Vance v. Vandercook Co.* (No. 1), 170 U. S. 438, 444, 445; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 22-25; *Heyman v. Southern Railway Co.*, 203 U. S. 270, 276. *An attack upon this right of the importing purchasers to sell in the original packages bought from the complainant, not only would be to their prejudice, but inevitably would inflict injury upon the complainant by reducing his interstate sales*, a result to be avoided only through his compliance with the act by filing the statement and affixing to his goods the labels it required. According to the bill, the State Chemist had threatened the complainant that in default of such compliance he would cause the arrest and prosecution of every person dealing in the article within the State and had distributed broadcast throughout the State warning circulars. *If the statute of Indiana, as applied to sales by importing purchasers in the original packages, constitutes an unwarrantable interference with interstate commerce in the complainant's product, he had standing to complain*, and was entitled to relief against enforcement by the defendant of the illegal demands. *Scott v. Donald*, 165 U. S. 107, 112; *Ex parte Young*, 209 U. S. 123, 159, 160; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146; *Hopkins*

v. Clemenson College, 221 U. S. 636, 643-645; Philadelphia Co. v. Stimson, 223 U. S. 605, 620, 621."

The court also, in considering the possible conflict between the Federal and state acts, said as to the state act that "so far as it affects interstate commerce, even indirectly and incidentally, it can have no validity if repugnant to the Federal regulations. * * * The object of the Food and Drug Act is to prevent adulteration and misbranding as therein defined. It prohibits the introduction into any State from any other state 'of any article of food or drugs which is adulterated or misbranded within the meaning of this act.' The purpose is to keep such articles 'out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destinations, provided they remain unloaded, unsold or in original unbroken packages.'"

This court held, however, upon analysis of the Federal act, that it did not cover the subject of ingredients which was covered by the Indiana statute, and that there was, therefore, no conflict between the Federal and the State act. It seems clear, from the reasoning of the above case, that if a conflict had existed the sale in the original packages which conformed to the Federal act would have been lawful.

This case was followed by *McDermott v. State of Wisconsin*, 228 U. S. 115. That case involved shipments of syrup from Illinois to local merchants in Wisconsin for re-sale. The shipments were in boxes with twelve half gallon tin pails in each case. When the shipments were received the wooden boxes were opened and thrown away, and the pails were put upon the shelf for sale. The pails

when put upon the shelves bore labels provided for in the Federal Pure Food Act. The Wisconsin law provided for a different kind of label, and also provided that no other label should appear upon the pail. There was then a plain conflict between the State and Federal act, and the question presented was whether the Federal act or the state act was operative after the crate had been received and opened and the pails had been put upon the shelf; which presented a situation like that involved in the case at bar. The Wisconsin Food Commissioner made complaint and secured a conviction of these merchants for violating the State act, the Wisconsin Supreme Court sustained the conviction. (143 Wis. 18). This court reversed the conviction. It was contended by the State of Wisconsin that Federal authority over the imported articles had ended and therefore the State's authority was absolute. This contention the Court overruled and denied the applicability of the doctrine of the original package decisions. We quote from the syllabus and opinion in that case:

"Package, or its equivalent as used in section 7 of the Food and Drugs Act, refers to the immediate container of the article which is intended for the consumption of the public. To limit the requirements of the act to the outside box, which is not seen by the purchasing public, would render nugatory one of the principal provisions of the act * * *." "While the enactment by Congress of the food and drugs act does not prevent the state from making regulations not in conflict therewith to protect its people against fraud or imposition by impure food and drugs." (Savage v. Jones, 225 U. S. 501), "the State may not, under the guise of exercising its police power impose burdens upon interstate commerce or enact legislation in conflict with the act of Congress on the subject."

"A state law on a subject within the domain of Congress, must yield to the superior power of Congress to

the extent that it interferes with or frustrates the operation of the act of Congress, a state statute is void. * * * As the Federal Food and Drug Act require articles in interstate commerce to be properly labeled, a state cannot require a label when properly affixed under that statute to be removed and other labels authorized by its own statute to be affixed to the package containing the article, so long as it remains unsold by the importer, whether it be in the original case or not."

"The doctrine of original packages was not intended to limit the right of Congress when it chose to assert it as has been done in the Food and Drugs act, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to chose appropriate means to that end."

"State legislation cannot impair legislative means provided by Congress in a federal statute for the enforcement thereof."

In the above case the court says (page 130): "*Congress manifestly is aiming at the contents of the package as it shall reach the consumer, for whose protection the act was primarily passed,*" and holds that the Federal statute is operative until the interstate article reaches the consumer, and in the language of the Federal statute is sold.

The Wisconsin case involved the sale of a can of syrup by the importer after he had removed it from the crate and thrown the crate away.

The case at bar involves a sale by the importer of a pail of lard taken from the crate in which it was imported at the time of the sale. In the Wisconsin case, the can was correctly labeled under the Federal Act. The pail here in question was correctly labeled under the Federal Act with the true net weight. Had the net weight label upon the pail sold to Pure Food Commissioner Ladd been incorrect, the plaintiff in error would have been subject to

prosecution under the Federal Food and Drug Act.

The question in the Indiana and Wisconsin cases above referred to was not simply whether the Federal law was applicable to the packages when they were sold, for that was plainly the case as to all subjects on which Congress had acted. The controlling question was whether the state statute conflicted with the Federal act. In the Indiana case, it was held that there was no conflict. In the Wisconsin case it was found that the state statute did conflict with the Federal act. We conclude, therefore, that if in the case at bar, there is a conflict between the Federal act and the state statute, the Federal act will govern and the state statute must yield.

It is of interest to note that after the decision of this court in *McDermott v. Wisconsin*, 228 U. S. 115, holding that a state cannot require a label put on packages under the Federal act to be removed, the legislature of Wisconsin, which was in session when the opinion was handed down, passed another act on the same subject. The new act required an additional label and penalized all sales which were made without the additional label. The validity of this act was called in question in *Corn Products Refining Co. v. Weigle*, 221 Fed. 988, and upon the authority of *Savage v. Jones* and *McDermott v. Wisconsin*, it was held valid only as to internal commerce and was held invalid as to interstate commerce.

We contend that there is a direct conflict. When Congress adopted the provision for labeling the true net weight on package goods, it adopted the method of making disclosure of net weight which is universal, and it covered the entire subject. When a label discloses the true net weight of a package as the Federal act requires it to do,

there is nothing more to be disclosed on the subject of the net contents. The disclosure is complete. There is nothing left to be supplemented by state action. So that an article of commerce thus labeled is not subject to further or other regulation on that subject by the state, at least until after it has been sold by the importer. In this case it would be after the sale to Ladd. We have, then, a case where not only is the state attempting to cover a subject on which Congress has fully acted, but in which Section 2 of the act complained of, by its provisions, actually conflicts with the Federal act. Under the Federal act, the pail of lard here in question, with its label showing its correct net contents to be 2 pounds and 6 ounces, could lawfully be sold to Ladd. The sale under the Federal act was a lawful sale. But under Section 2 of the state act, as construed by the state court, the sale was unlawful. The use of the fractional pound pail and the fractional pound label was prohibited by the state act. The use of Federal labels showing net contents when they are in fractional pounds is entirely prohibited by Section 2, as well as the use of pails containing fractional pounds. In order to lawfully sell the lard in these pails, under the state act, plaintiff in error would have to change the labels which comply with the requirements of the Federal law, substituting labels which comply with the requirements of the state law,—the very thing condemned in the McDermott case, and remove or suffer the loss of the extra lard over even pounds contained in each pail.

Section 2 is not supplementary to the Federal statute, or on a subject which is not covered by Congress. It presents a direct conflict and is, in effect, a prohibition of all sales of lard not put up and labeled as Section 2 requires,

and is a prohibition of the use of all fractional pound labels which Congress found sufficient protection for the purpose of showing net weight on all package goods subject to its jurisdiction. The label which was put on the package under the Federal act furnished the evidence by which the guilt or innocence of the defendant was to be determined. Under the rule of interpretation laid down in the McDermott case, Federal control, so far as the label was concerned, extended until the package reached the consumer for whose protection the label was required. Congress having acted upon the subject, the state was without power to act upon the same subject; at least it was powerless to make laws which would be operative thereon while the package was still subject to the protection of the Federal act on that subject and, as we understand the interpretation of the Federal act in the case to which we have referred, the protection of that act extends to package goods which are labeled under its authority and requirements until the package reaches the consumer for whose protection the law was passed. When the sale here in question was made to Professor Ladd, the package was still subject to the Federal act as to net weight labeling, and was not subject to the laws of the state.

We submit, therefore, that Section 2 of this act, containing these labeling and standardizing provisions which are claimed to have for their purpose the showing of the true net weight, not only deals with a subject upon which Congress has expressly acted, but directly conflicts with the provisions of the Federal Food and Drug Act upon the same subject. For these reasons, among others, the conviction under the state act should be reversed.

The majority of the North Dakota court held that inasmuch as the seal of the car in which the pail in question was shipped from Omaha had been broken, and also because the crate in which it was packed had been opened at the time of the sale of the lard to Ladd, all Federal authority over it had ended, and the state's authority over it was supreme. The Federal act, as interpreted by this court in cases above cited, as we understand them, does not thus restrict the operation of the Federal act, and we submit that the majority opinion conflicts with the Federal act as interpreted in the above cases.

BREAD CASES AND TENNESSEE CASE.

No other state or country has adopted a statute containing such arbitrary provisions as are contained in Section 2 of this act. No court, so far as we can discover, has ever sustained a statute of like, arbitrary character. We know of no principle upon which it can be sustained. The majority opinion of the North Dakota Supreme Court refers to what are known as the "Bread Cases" and to a Tennessee case as supporting their conclusion (Tr., pp. 137, 138), citing, among other cases, *Chicago v. Schmidinger*, 243 Ill. 168, affirmed in 226 U. S. 578; and *State v. Co-operative Store Co.*, 123 Tenn. 399, 131 S. W. 867.

It will be found, on examination of these cases, we think, that they do not sustain the majority of the conclusion of the North Dakota court.

In the case of bread, the situation is different than as to lard. It is marketed under different conditions. Statutes and ordinances regulating the sale of bread rest upon vastly different conditions. Section 2 of the act we are complaining of deals exclusively with lard in containers.

Lard in containers is classed as package goods and is subject to general labeling laws. Bread is not sold in containers. It has only its own bulk and weight and is not classed as package goods, and does not come under the labeling laws which are generally applicable to package goods.

Next, statutes and ordinances regulating the size and weights of loaves of bread usually standardize the size and weight which has been established by custom and use, or one which is peculiarly suited, because of local conditions, to the bread trade, requiring loaves to be of the size and weight with which the public are familiar, or which are peculiarly suited to the bread trade, or with a view that consumers may not be deceived as to the quantity of bread they are getting.

Next, bread statutes and ordinances standardizing loaves, when they are sustained, generally, and we think, without exception, permit loaves of other sizes and weights to be sold, provided they are sold by weight. The Chicago bread ordinance was sustained by the Illinois Supreme Court. In its opinion the court said: "There is nothing in the ordinance which limits the weight of a loaf of bread to a pound, or the fractional part of a pound or the multiple of a pound." This court, in affirming the Illinois decision, said: "That the ordinance is not intended to limit the weight of a loaf to a pound, or the fractional part or multiple of a pound, but the ordinance was passed with a view only to prevent the sale of loaves of bread which are short in weight." The true rule applicable to a statute fixing a standard size of an article or package is, we think, that such statute is only intended to apply to articles when sold by the statutory standard, and is not

intended to apply to articles when they are sold and priced by weight.

The distinction between bread statutes and ordinances and Section 2 of this act of which we complain is made clear by comparing Section 2 with Section 3 of this very act.

Section 2, as construed by the majority of the Supreme Court, requires lard in containers to be sold in even net pounds and prohibits sales in containers of other quantities under all circumstances. Section 3 requires loaves of bread to be of specified sizes and weights, but expressly provides that loaves of bread of different weights may be sold "when plainly labeled with the exact weight thereof." This saving clause is common to bread statutes and ordinances generally, and we contend that this exemption is essential to the validity of such statutes.

It will also be found, on examining the opinion, that the majority of the state court erred in resting their conclusion upon *State v. Co-operative Store Co.*, 123 Tenn. 399, 131 S. W. 867. In referring to that case, they said: "This is almost identical in principle with the case at bar. * * * This is a well considered case."

We submit that the majority either misunderstood or misapplied the principles of the above case. In that case the Supreme Court of Tennessee was dealing with a state statute providing for the sale of corn meal in bags containing one bushel, one-half bushel, one-quarter bushel and one-eighth bushel. Corn meal was a common article of food in Tennessee. By common usage it was generally sold by the bushel or fraction of a bushel. A fraudulent practice had arisen of putting into these bags a different quantity of meal so that many of them did not contain

what they purported to contain; in other words, they were short in weight of what they purported to contain, thereby deceiving and defrauding the public. Purchasers were buying and paying for meal which they did not get, because of the misrepresentation as to quantity. There was an actual fraud to be corrected. It will be noted that the Tennessee statute did not establish a new or different standard of quantity from that with which the people were accustomed. It merely adopted the standard of quantity of meal which was fixed by custom, and provided that these bags must contain the quantities which by custom they were supposed to contain. Further, the Tennessee statute, as construed by the court, did not prevent the sale of meal in different quantities in bags when it was priced and weighed.

Our situation is entirely different. There were no short weight sales of lard in pails being made. Prior to the 1905 and 1907 net weight laws, these lard pails were known and sold as 3, 5 and 10 pound gross weight pails. The quantity of lard contained therein was always 3, 5 and 10 pounds less the actual weight of the pail. They were never sold, or understood, as containing 3, 5 or 10 pounds net of lard. The purchaser always knew that he was getting 3, 5 or 10 pounds of lard less the weight of the pail. The pails did not purport to contain 3, 5 or 10 pounds net, and the purchaser did not pay for 3, 5 or 10 pounds net, as in the Tennessee case. He was not charged for any lard which he did not get. Since 1905, when the net weight labeling law was passed, that is, six years before this arbitrary 1911 standardizing law was passed, the net weight was plainly labeled on the pail so that the purchaser knew on each purchase not only the gross weight

of the pail, but also the net weight of its contents. The North Dakota statute in question, unlike the Tennessee act, establishes a new and arbitrary standard of quantity for sales which is entirely different from that which for a quarter of a century has been known to the producers and consumers of lard. It does not, like the Tennessee statute, merely affirm an existing standard of quantity; and further, our statute, as construed by the majority of the state court, unlike the Tennessee statute, prohibits the sale of lard in containers in different quantities than the even pounds, even when it is priced and weighed. Further, Tennessee was dealing with a practice of giving short weights in meal—a condition which, without dispute, never existed in the lard business.

It will be noted that the Tennessee act, in its title, gives as a reason for the act, "the practice in this state of putting up and selling meal in short weight packages. * * *"

We quote the following from the opinion:

"The object of this statute is the prevention of fraud in the sale of one of the most common articles of commerce and food. The fraudulent practice sought to be suppressed is the sale of packages of corn meal, purporting, expressly or by implication, to contain certain weights and measures *for which the purchaser is charged*, when in fact they contain less quantities, whereby the public is deceived and defrauded to the extent of the deficiency in weight or measure of the package purchased."

Page 868.

"It simply provides that when a certain staple article of food, of universal consumption in this country, is sold in packages, the packages shall contain certain quantities of the article, and that the quality and quantity—that is, whether bolted or unbolted, and

how many bushels, fractions of bushels, and pounds—shall be printed and marked thereon.

It is well known that corn meal is generally sold by the bushel, or the fraction of a bushel, and is put in packages purporting to contain such quantities, and the object of the statute is to prevent the giving of short weights in these packages. * * *

Nor is the act, when properly construed, discriminatory. It does not prohibit the manufacturer, the wholesaler, or any person from selling meal in any bag, or other receptacle, or quantity, desired by the seller or consumer, when priced and delivered by actual weight or measure. All persons, whether retailers or not, may sell it in that way.

The statute only applies where it is put in bags or packages for sale, and sold or offered for sale without being weighed or measured."

Page 869.

We do not criticise the rule adopted in the Tennessee case for interpreting statutes standardizing packages and in sustaining the same when they permit other sales than those prescribed, namely, when the articles are "priced and delivered by actual weight or measure." Our contention was, and is, that if the North Dakota statute can be sustained at all, it can only be for the same reason that the Tennessee statute was sustained; that is, under a construction which will permit other sales than those prescribed when they are delivered by actual weight or measure. This controlling feature of the Tennessee decision and statute was apparently overlooked by the majority of the North Dakota court, for the majority places a construction upon the North Dakota statute which not only does not permit other sales of lard to be made, but actually prohibits sales of lard in containers in quantities other than those prescribed, even though they be sold and delivered by actual weight and measure. We contend that if

the North Dakota court had applied the principles of the Tennessee case to the statute under consideration, it would have been compelled to sustain our contention that when properly construed it permitted other sales to be made, or that the prohibition of other sales was entirely void.

To make Section 2 of the North Dakota statute conform to the Tennessee act, it would have to standardize known and customary quantities and would require sales in containers to be in 2 pounds 6 ounces net, etc., instead of standardizing new quantities, and it would further provide that lard in containers might be sold in any other "quantity desired by the seller or consumer, when priced and delivered by actual weight or measure," as provided in the Tennessee act. Section 2 of the North Dakota act, however, does just the reverse. It standardizes new quantities and entirely prohibits the sale of other quantities, even though priced and delivered by actual weight.

FUNDAMENTAL ERRORS IN THE MAJORITY OPINION.

An examination of the majority opinion of the North Dakota Supreme Court will show, we think, that in reaching their conclusion they were largely controlled by a number of errors to which we will now call attention.

First, in importance, was their evident and confessed unwillingness to pass judgment upon, and especially against, an act which originated with the Pure Food Commissioner or his department. The opinion will show that the court divided upon the question of judicial duty. We quote from the majority opinion (Tr., p. 131) :

"Keeping in mind then the extraordinary burdens of proof placed upon the defendant in this case in its

attack upon this statute, we approach the facts in this case. As early as 1899 the legislature of this state provided for a Food Commissioner and enacted pure food laws. Every session of the legislature since that time has contributed further legislation upon the subject. For nearly fifteen years Professor Ladd has been such Pure Food Commissioner and the Agricultural College of this state has maintained a department for the testing of foods and weights and often has had men traveling over the state making purchases and studying the subject of pure foods and honest weights and measures in a scientific and painstaking manner. *The 1911 law was drafted by Professor Ladd after twelve years of observation and study. He is one of the recognized authorities of the United States and his opinion upon this subject might alone be enough to create a doubt of the proposition advanced by the defendant that there is no necessity for the law.* The expert who drafted the law, the legislature who passed it and the Governor who approved it, all thought necessity existed for such a measure."

We also quote from the minority opinion of Judge Fisk, the present Chief Justice, (Tr., p. 147) :

"I take it for granted that all must agree that in its exercise of the so-called police power of the state the legislature does not have absolutely a free hand, but is restricted by certain constitutional limitations, and that it is the solemn duty of the courts, when called upon so to do, to uphold such constitutional limitations, by pronouncing any act null and void which plainly transgresses them. Instead of the legislature being the exclusive judges, it is for the courts to determine whether an attempted exercise of such police power is necessary for the public welfare, or whether it is a mere arbitrary, unnecessary and capricious interference with the legitimate business of the citizen.

I am, therefore, unwilling to sanction the doctrine that because Prof. Ladd, who concededly stands high in the public estimation as an expert on pure foods and pure drugs, drafted the bill which finally became the act in question, and that such legislation successfully found its way upon our statute books through

the friendly offices of both the legislative and executive departments of the state, that this gives it a *carte blanche* which the courts are in duty bound to respect. If such a doctrine is to receive the sanction of the courts I fear that serious consequences may result, even through the best of intentions on the part of such distinguished experts as Prof. Ladd, although in good faith sanctioned by legislative and executive authority. That such doctrine is not the law I think the courts have spoken in no uncertain language. A mere statement of the proposition ought to suffice to disclose its fallacy."

Next in importance was the error confounding "gross weight sales" with "short weight sales," and overlooking or disregarding the fact that all package lard has been sold in North Dakota by net weight and labeled weight since the passage of the 1905 and 1907 net weight sales and labeling laws. This error was prejudicial. The plaintiff in error had shown in the record in much detail the method under which pail lard had been marketed from the earliest years, and had shown that prior to the passage of the net weight and labeling laws it had been sold by gross weight. The majority of the court, by assuming that gross weight sales were synonymous with short weight or deficient weight sales, found that "an abuse" existed which should be corrected. This error not only led to an erroneous conclusion, but did the plaintiff in error a great injustice. It is undisputed in the record that short weights were never given in the lard business even when the gross weight system prevailed, and it is also undisputed that when the net weight sales and labeling laws were adopted in North Dakota, they were promptly complied with and that no short weights have been given in the sale of net weight pails. The official syllabus in the original opinion, prepared by the majority to show the points decided,

erroneously stated (Tr., p. 126) : "It is contended by defendant that the act should be given a reasonable interpretation, thus permitting the sale of short or gross weight pails if labeled with the net weight * * *."

And from the majority opinion we quote as follows (Tr., p. 134) :

"Defendant further claims the law to be unreasonable, because it had been its custom and the custom of the other packers for over twenty years to use gross weight pails and that it had therefore become a settled right of the trade. We do not believe this argument sound. The pails have been in use less than thirty years while the lard industry has existed for many hundreds of years. Questions like this are not settled in a day, nor in thirty years. No reason is given why short weight pails were used in the beginning. Gross weight is unfair, always has been unfair and always will be unfair. Net weight is fair and just and should eventually predominate. It is hard to believe that the selection of short weight pails thirty years ago was not an attempt to deceive somebody. Can it be possible that a thirty years' tolerance of an evil forever thereafter forecloses mankind from seeking a remedy?"

Again, (Tr., p. 145), the governor and legislature have determined "that the prevention of fraud and short weights is at the present time a paramount necessity." The petition for rehearing (Tr., pp. 171, 172) called attention to this fundamental and prejudicial error and, in the revised opinion filed denying the petition, the error in statement was in a measure corrected, but not the conclusions based thereon.

We may further enumerate the following additional errors which, to some extent, controlled the result:

(a) Their conclusion that Federal authority over package goods which are labeled under the Federal Food and Drug Act, and shipped from one state to another, ends when the car or crate is opened (Tr., pp. 142, 143, 209, 210, 146, 147 and 214).

(b) In voluntarily examining the lard pail in question two years and four months after it was sold, and questioning the sufficiency of the label on the pail, the sufficiency of which was at no time, and in no respect, in question (Tr., pp. 132, 133, 134, 181, 182, 183, 200 and 1).

(c) In stating, contrary to the undisputed testimony, that the special even pound pails manufactured by plaintiff in error for Park & Tilford could be used for the North Dakota trade (Tr., pp. 134, 135).

(d) In assuming and stating, contrary to the evidence, that fraud was practiced in the lard industry while the gross weight sales system was in vogue.

(e) In disregarding or overlooking the fact that since the net weight sales and labeling acts of 1905 and 1907 were passed in North Dakota, all lard in containers has been sold by net weight and that the law has been obeyed and no short weights given.

(f) In assuming and stating, in substance, that the use of these pails and the packers' trade mark thereon for advertising purposes constitutes a fraud upon the consumers (Tr., pp. 135, 136).

Other independent errors and errors incidental to those mentioned will appear from an examination of the majority opinion; all of which manifestly contributed to the erroneous conclusion in sustaining this statute.

We submit that our assignments are well taken and should be sustained and the judgment of the state court should be reversed.

Respectfully submitted,

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3
No. 258

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1914.

ARMOUR AND COMPANY,

Plaintiff in Error,

vs.

THE STATE OF NORTH DAKOTA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

(24,388)

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INDEX

	Page
Statement	1
Reasons for the law and authorities in support thereof	2
Argument on the transaction in question	30
The statute is not special legislation	34
The right of the State to regulate sales as to quantity ..	43
The statute does not conflict with the Federal Food and Drugs Act or the Federal Constitution	57
Comparison of the statute with statutes of other states; bread and Tennessee cases discussed	58



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1914.

ARMOUR AND COMPANY,

Plaintiff in Error,

VS.

THE STATE OF NORTH DAKOTA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This is a criminal action brought by information to the District Court of Cass County, North Dakota. By stipulation in open court, a trial by jury was waived and the issue tried by the court with the same force and effect as if a jury had been impanelled and sworn to try the case. (Tr. p. 11). The plaintiff in error was found guilty and fined \$100 and costs. (Tr. p. 8). No question as to the sufficiency or regularity of the proceedings is involved, and no claim is made that plaintiff in error was convicted without due process of law, in the sense that the forms prescribed by law were not complied with. After the state had established the allegations of the in-

formation and rested its case the plaintiff in error was permitted to, and did, introduce a considerable amount of testimony to show, as claimed by it, the unreasonableness of the law. The state objected to this evidence and took the ground that the constitutionality of the statute in question must be determined upon the law itself and not by hearing evidence. The trial court, sitting as it did without a jury, decided to hear such testimony upon all its phases. (Tr. p. 14.) The admissibility of such evidence must be determined by the same rules which would apply in case the action had been tried to a jury instead of to the court, and if it is incompetent, irrelevant or immaterial it should be disregarded.

After an affirmance of the judgment of conviction by the Supreme Court of the State of North Dakota the case came to this court on a writ of error. The assignments of error made in this court attack the statute under which the conviction was had on the ground that the provisions thereof are repugnant to the constitution of the United States and in contravention thereof. (Pages 6 and 7, Brief of Plaintiff in Error).

REASONS FOR THE LAW AND AUTHORITIES IN SUPPORT THEREOF.

There is no disputed question of fact in this case. Most of the evidence introduced on the part of the plaintiff in error was to show the unreasonableness of the statute and the damage its enforcement will cause to plaintiff in error and other packers, and for its sup-

posed bearing on the constitutionality of the law. The plaintiff in error contended in the district and supreme courts of the state, and now maintains in this court, that no necessity exists for the law in question. While it is not necessary to the validity of the statute to show the reason therefor, the state claims it is reasonably necessary and is founded upon sound economical principles. Lard is a household necessity which is daily used in cooking and baking. For convenience in handling, as well as for sanitary reasons, it has become a universal and extensive practice to pack lard for sale in pails or containers of convenient sizes for meeting the requirements of the ordinary household. These pails have acquired by usage the designation of three pound pails, five pound pails, ten pound pails, etc. The net amount of lard they contain depends, however, upon the whim of the packer. The actual amount of lard contained in the pail for the sale of which the plaintiff in error was convicted was two pounds, six ounces. This pail was of the size commonly known to the trade as a three pound pail of lard. It also appears that the five pound pail was made to contain four pounds two ounces of lard, the ten pound pail eight pounds ten ounces, etc.

In the mind of the average buyer the pail contains the number of pounds of lard which its name implies. That is, a three pound pail represents three pounds, a five pound pail represents five pounds, etc.

In the absence of any law requiring the net weight of a commodity to be disclosed the packer or merchant has

the opportunity to actually or even wilfully deceive as to the real contents of the package. He can reduce the net weight of the lard by increasing the weight of the package; and unless the container is opened and the contents weighed the consumer must depend upon the representations of packer or merchant as to the real amount of lard he is getting. In every day practice the representations of the packer or merchant, expressly made or tacitly suggested, are accepted and acted upon by the general run of consumers. Nay, more, the popular conception as to the quantity of lard in the container is the conception accepted and acted upon by the ordinary buyer; and the packer and merchant can merely tacitly adopt the popular conception and profit accordingly, at the expense of the buying public. In short, they can take advantage of the popular idea as to the quantity of lard contained in the pail and thereby collect, without the buyers' actual knowledge, the same price for the weight of the package as they obtain for the contents. As a result of this practice the consumer not only may be, but actually has been, paying large sums for tin and packing which he probably would not have paid had his attention been specifically directed to this practice.

The object of all net weight and measure laws is to circumvent the opportunity for the practice of imposition upon the buyer which is always possible in sales of ready-made packages. It was maintained by the plaintiff in error that it has diligently invited the confidence

of the public and has at all times strived to deserve such confidence in its product. The packing business in this country has grown to enormous proportions and a large part of the consuming public is compelled to purchase the products of the packers as they are offered on the market. The statute in question is justified on the principle that one who invites the confidence of the public may be compelled to submit to such regulations as will guard the public as far as possible against misapprehension and possible imposition and fraud.

Freund on Police Power, Sec. 274-5;

Tiedemann on Police Power, Sec. 89;

People vs. Wagner, 86 Mich. 594;

McLean vs. Arkansas, 211 U. S. 539.

The legislature of the State of North Dakota, having in mind the history of the package trade in this state, and being fully aware of the opportunities for possible fraud upon and misapprehension by the consumers of lard and other food products, passed acts at its sessions in 1905 and 1907, known as the Pure Food Law. This law required proper labeling of all foods and beverages, and provided among other things that if every package, bottle or container does not bear the true net weight, the name of the real manufacturer or jobber, and the true grade or class of the product, the name to be expressed on the face of the principal label in clear and distinct English words, in black type on a white background, said type to be in size uniform with that used to name the

brand or producer, it shall not be considered properly labeled.

Labels disclosing the net weight are not effective in actual practice because the popular designation of a package will continue to prevail in spite of labels. Then, too, labels are oftentimes, and in fact generally, unheeded. The ignorant heed them not because they do not understand them. The busy housewife as a rule does not notice them. Labels are easily removed or displaced, either by accident or design. For example, on the pail introduced in evidence in this case there is lithographed in a prominent place, in large letters, the following: "Armour's Shield Pure Lard. Armour & Co., U. S. Inspected and Passed Under the Act of Congress of June 30th, 1906. Establishment 2-C." The label containing the net weight is nearly on the opposite side of the pail and in small letters.

The only way to insure honest weight in package goods is to standardize the package. That is, to make the net contents correspond with the popular designation of the package. Thus a one pound pail will mean a pail containing one full pound of lard. To do this, of course, necessitates fixing the various sizes of pails or packages in which the commodity may be sold, when not sold in bulk by actual weight. To accomplish this the North Dakota legislature passed Chapter 236 of the Session Laws of 1911, the statute under which the conviction in this case was had. This law requires lard or lard com-

pound or lard substitute, unless sold in bulk, to be put up and sold in pails or other containers holding one, put up in pails or other containers holding one, three, three, and five pounds net weight, or some whole multiple of these numbers, and not any fractions thereof. The statute contains the further provision, not noticed in the argument of plaintiff in error, that: "If the container be found deficient in weight additional lard, compound, or substitute, shall be furnished to the purchaser to make up the legal weight." The plaintiff in error did not in its defense claim that it furnished additional lard to make up the difference in the net weight between two pounds, six ounces and three full pounds. The purpose of this clause in the statute was undoubtedly to permit the packers to sell such gross weight pails as they may have had on hand within a reasonable time after the taking effect of the law, by furnishing to the purchaser additional lard to make up the full legal weight of the pail.

The reason for not permitting fractions of a pound is obvious. Products, such as lard, used every day and in considerable quantities are nearly always bought and sold by the pound. The same reason for permitting fractions of pounds or ounces or grains in packages of some other goods, such as fancy articles, drugs and medicines, certain food products, etc., does not obtain in the case of lard. In other words, the pound is the unit of measurement to the consumer of lard, and this statute was

passed for his benefit and protection. If fractions of a pound be permitted the difference between the size, appearance and heft of two pails differing a few ounces in weight could not be readily discerned, and hence deception and misapprehension would be greatly facilitated. It would be difficult without a careful examination to discover the difference between a two pound, six ounce pail and a three pound pail.

Plaintiff in error claims that generally speaking all products sold by weight in package form have, from the earliest times, been sold on a gross weight basis and that this is well understood by dealers and the public generally, and that such practice has long been recognized as a proper and legitimate method of merchandising and is as fair and honorable as any other method of sale, and in many cases is the only proper method. This is wrong in principle. It is not true that sales of goods in packages by gross weight have been universally recognized as the proper method of marketing products. Rather it has been the custom to specify whether the product was sold by gross or net weight, and to fix the price accordingly. As remarked by Judge Darling in *Lane vs. Randall*, 2 Q. B. 673:

“It would be more honest to charge the customer more for the tea than to make him pay for the wrapper in this way.”

It may be true that lard in packages of sizes suitable for the retail trade has been sold on the basis of gross weight since the inception of the industry, but is it not

reasonable to suppose that such practice was a devise of the packers to obtain more for their product? There is nothing in the testimony offered by the plaintiff in error to show that there ever was any demand for a standard pail containing, for instance, two pounds, six ounces. It is now, however, the purpose of the North Dakota law to require the pails to contain what they are generally understood to contain, and that the weight shall be net instead of gross.

It may be true, as claimed by plaintiff in error, that the pails of lard have always come up to the full gross weight. The North Dakota law is not designed to bring the package up to the full gross weight but to net weight, and to prohibit the sale of lead and metal in place of lard. The trade has never represented to the consuming public that the pails of lard were gross weight, and so far as the record shows the packers never made such representation to the retail dealers until the enactment of the federal and state laws requiring the net weight to be shown. Plaintiff's Exhibit B (Page 118 of the printed Transcript), which is dated April 2nd, 1910, shows that the price of lard to the dealer was fixed by the plaintiff in error by gross weight, and Defendant's Exhibit 2, being a schedule of prices (Tr. Page 119) shows that its prices on December 1st, 1910, per crate were by gross and not by net weight, so that shortly before the enactment of the statute in question the plaintiff in error was fixing the price of its lard by gross instead of by net weight.

In order to protect the people from the danger of impure foods and to advise them of the ingredients contained in food packed in containers, Congress passed the Federal Food and Drug Act of June 30th, 1906, Chapter 3915, 34 U. S. Statutes at Large, pages 768 to 780. In 1905 the legislature of North Dakota enacted a statute to prevent the adulteration, misbranding and selling of adulterated and unwholesome foods and beverages, known as Chapter 11 of the Laws of 1905; and in 1907 re-enacted substantially the same statute, in Chapter 195 of the Session Laws of North Dakota for that year. These laws are in line with the national and state-wide legislation on the same subject and came in response to a public demand for relief against the adulteration and misbranding of foods and beverages.

To guard the public against imposition and fraud as to quantity in the sale of food products in package form the North Dakota legislature enacted Chapter 236 of the laws of 1911, the statute for the violation of which plaintiff in error was convicted. In principle there is little, if any, difference between a statute requiring honest weights and measures and one requiring purity of the product. Plaintiff in error argues that the statute should be declared unconstitutional because its operation will be to enhance the price of lard in pails, thus resulting in a return to the general use by consumers of the lard in bulk. This constitutes no reason why the consumer should not get the full amount of lard purport-

ing to be furnished him. He will still be at liberty to purchase lard in bulk by strictly net weight, if he prefers to do so, after his attention is called to the fact that he is required to pay the price of metal, labels, lithographing and expensive advertising in the place of lard. It cannot be successfully contended that the consumer will be subjected to the unsanitary conditions which existed before the packing of lard in pails. If the protection afforded by law were the same now as at the beginning of the packing of lard in pails there might be some force in this argument. If there was no inspection law in North Dakota but the net weight law, then it might be true that the enforcement of this statute would discourage the packing of lard in pails, but there are other laws which protect the consumer from unsanitary conditions in the handling and sale of bulk lard. When the law requires that the pail shall contain full net weight by pounds it will be for the consumers to determine for themselves whether they prefer to buy their lard by bulk and furnish their own containers or to pay an additional price for a container and label and the cost of advertising.

Plaintiff in error claims that the effect of the enforcement of this law will be that the expense of supplying the markets of North Dakota with new sizes, to this one company alone, which furnishes but two thousand tierces in all per annum (60 per cent of which is in pail form) in the one item of change of electroplates, dies, and ma-

chinery, will be \$11,337.46, and that all other packers, large or small, will be compelled to undergo the same expense proportionately, or go into the open market at a larger expense and secure pails of required sizes, and that this definite expense will be renewed every five years or thereabouts. That other items of expense will be more tin, larger crates, extra expense in the accounting department, extra price lists, etc., and that the additional cost and labor will add $1\frac{1}{4}$ cents per pound to the cost of the lard. That this will undoubtedly be borne by the consumer without any additional benefit; or the most likely result will be that the people will not pay the additional price and will be forced back to purchase in bulk and re-establish the old and unsanitary conditions.

Plaintiff in error further claims that to supply the markets of one state, not with a purer product or with any more fairness as to weight, but simply with a different size or shape tin, will require of every packer to conduct separate operations and transactions from every other part of his business, as follows: Separate operation of machinery; extra and separate stocks of tin; separate and extra stocks of finished pails; extra accounting, bookkeeping, inventory, reports, etc., separate and extra stock of crates and special sizes of tin will be required to be always on hand requiring an investment of a very large sum of money, it requiring a considerable time to get the necessary and required sizes, not being standard sizes in the market.

That it will be practically impossible to conduct the business or it will be necessary to conduct it at a loss, because, in order to meet competition, it is necessary to ship from any plant, and it will require a stock of all these extras, including the filled extra size pails, at every establishment—a necessarily large investment in stock without movement and that much will be spoiled by lack of movement. That the spoilage alone will be sufficient to practically prohibit the business if the stock cannot be kept fresh by distribution.

It is further claimed that the above are not matters of inconvenience or incidental expense attached to the operation of the business which ordinarily must give way to the police regulations of the state, but are restraints upon the business of all packers to such an extent that the business cannot be continued; not only will a legitimate business be practically prohibited, but the people will receive no benefit—on the contrary, detriment. They will be prevented from exercising their full right of contract and from getting goods in a convenient and sanitary form. That all this will be without any evil to be cured, as no one can by legislation be protected from heedlessness and blindness to obvious facts; the consumer is protected in every way as to quality and net weight of goods he receives; and the result is the preventing or arbitrarily restricting the operations of a legitimate business and a legitimate sale by the manufacturer of a commodity in containers which have been the established

sizes for many years, and the prohibiting of the purchase by the consumer of the package of the size which he may want and has a full right to buy.

No such dire consequences will result either to the packers or the consumers. Under our pure food law the packers must furnish wholesome and clean lard, and there is no danger of the packers going out of business rather than to comply with the law, in case the court holds the law constitutional.

The evidence shows that many of the results pictured to follow are largely speculative. It is shown that the defendant can afford to and does, for one firm in New York City, Park & Tilford, put up lard in pails containing three, five and ten pounds net weight. It is true the testimony shows that the pails put up for Park & Tilford are in the Park & Tilford style, and they differ from the Armour style in the form of the pail. Our law does not require any particular style or form of pail

It will not be any great hardship for plaintiff in error to manufacture pails of one, three and five pounds or even multiples thereof. Its evidence shows that the appliances for making pails or containers have to be renewed about every five years, and evidently some of them are being renewed every year; and it would seem that it is just as easy and nearly as cheap to make a pail that will hold one, three or five pounds of lard or even multiple thereof, as it is to make a pail that will hold 2 lbs. 6 oz., or 4 lbs. 2 oz., of lard, etc.

The following general principles applicable to the case may be stated:

"The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the state."

"The right to make lawful contracts is embraced in the conception of liberty as guaranteed by the constitution."

However, "there is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibition imposed in the interests of the community."

This right to make contracts "is subject, also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction."

The principle involved in transactions under these rules is "that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with the liberty of contract; but where there is reasonable relation to

an object within the governmental authority, the exercise of the legislative inquiry is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative consideration in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." *C. B. & Q. R. Co. vs. McGuire*, 219 U. S. 549.

Again, this court said in *McLean vs. Arkansas*, 211 U. S. 593: "The legislature, being familiar with the local conditions, is primarily the judge of the necessity of such enactments. The mere fact that a court may differ from the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. * * * If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary

interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail."

And finally, "every possible presumption," Chief Justice Waite said, speaking for the Court in *Sinking Fund Cases*, 99 U. S. 718, "is in favor of the validity of a statute and this continues until the contrary is shown beyond rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institution depends in no small degree on a strict observance of this salutary rule."

It would appear to us that the argument of counsel regarding the consequences and results that would follow if plaintiff in error were compelled to obey the law in question might well be addressed to the legislature, but has no place here. Because North Dakota is the only state that now has this law, it does not follow that within a short period other states will not have similar acts. With the advanced thought of the age upon this question, the time will arrive soon when all the states will adopt similar legislation, because it is right in principle.

The state of Tennessee recently passed an act fixing the standard weight of a bushel of corn meal, whether bolted or unbolted, at 48 pounds, and when put up and offered for sale in bags, required the bags to hold 2, 1, $\frac{1}{2}$, $\frac{1}{4}$ or $\frac{1}{8}$ bushel by standard weight. The act was attacked in the courts of that state as unreasonable and discriminatory. It was upheld, the court saying:

“The enactment of statutes to prevent fraud is a proper exercise of the police power of the state which is under the control of the legislature. The power to pass laws upon the subject necessarily carries with it the choice of methods to make the legislation effective, provided the same is reasonable and not arbitrary. * * *

We see nothing in this statute which deprives a citizen of the liberty to contract or of his property. It simply provides that when a certain staple article of food, of universal consumption in this country, is sold in packages, the package shall contain certain quantities of the article, and that the quality and quantity—that is whether bolted or unbolted, and how many bushels, fraction of bushels and pounds—shall be printed and marked thereon.”

State vs. Co-operative Stores Co., 123 Tenn. 399.

Even if it were true that in order to regulate the sale of lard it is necessary to include every article used for shortening in food products, this act meets the conditions because it covers not only lard but also lard compound and lard substitutes. A compound means anything that is a combination of two or more elements, ingredients or parts. Consequently lard compound means anything that is a combination of lard and two or more other ingredients. Lard substitute means substitute for lard or a substance that takes the place of or serves in lieu of lard.

State vs. Aslesen, 50 Minn. 5.

It is conceded that the legislature may require net weight to be disclosed on outside label.

Plaintiff in error cannot seriously deny that it is a proper exercise of police power to require lard and similar commodities, when not sold in bulk, but sold by the pail or package, etc., to be sold in packages of fixed sizes. At least it cannot now be seriously doubted that the legislature may properly regulate the size of packages in such cases, and that such regulation is not an unreasonable interference with the freedom of contract or with property rights.

The law passed on in State vs. Co-operative Store Co. supra, goes farther than the law in the case at bar. It not only provided that the packages must be put up in certain sizes and labelled, but fixes the number of pounds of corn meal in a standard bushel.

In Turner vs. Maryland, 17 Otto, 38-39, 107 U. S. 38; 27 Law Ed-370, a series of Maryland statutes regulating the handling and sales of tobacco were in question. In substance the successive statutes provided that tobacco grown in Maryland and intended for shipment out of the state, must be packed in quantities fixed by the acts in a certain kind of container of certain dimensions, and on the outside thereof should appear the name and address of the packer and the net weight. In other words, the law required both a label showing net weight and a package of a certain size containing a fixed net weight.

In addition to this the tobacco so packed had to be inspected and the weight and container approved by an official inspector. The law, however, provided that tobacco which was packed in the county or immediate neighborhood where it was grown, was relieved from some of the requirements as to inspection, etc.

The law was attacked in the United States Supreme Court for three reasons:

1. That it was an attempted regulation by the state of inter-state and foreign commerce.
2. That it improperly discriminated against the non-resident buyer in favor of domestic buyer and manufacturer.
3. That it improperly discriminated between different exporters of the same article.

The court sustained the law, holding that there was not an improper classification; that the requirements of certain kinds and sizes of packages as well as a label showing true net weight was proper.

There is attached to this opinion a note containing a catalogue of numerous laws of the Colonies and of the states after the constitution was adopted, in which the size and kind of packages were fixed. See note on page 51 et seq., Official ed. and page 375, Law Ed.

Plaintiff in error may attempt to distinguish this case and claim that the law was sustained for the reason that it was a tax regulation and that it was necessary that the tobacco be packed in barrels or hogsheads of a certain weight to facilitate the work of the official inspector. The

fact that inspection was required does not affect the principle in the slightest degree. The inspection was only an additional safeguard. It was not a taxing law. If it were, it would have been held void. It was a police regulation for the protection of the people of Maryland with respect to a commodity, the production of which was the leading industry of the state. Hence, in the exercise of the police power the state had the right to regulate its sale so as to guard against fraud and imposition. And in doing so had the right to not only require net weight to be shown on the label, but also to require the sales to be made in certain sized packages of a given weight.

Not only this, but it had the right to go further and provide for inspection by an official inspector to insure observance of the law. Hence, the fee required to be paid for such inspection was not a tax, and consequently did not violate the federal constitution prohibiting tax on exports or interference with inter-state commerce.

A Massachusetts law required that shingles sold by the thousand in ordinary course of business must be of certain size and shape and must be officially surveyed.

Wheeler vs. Russell, 17 Mass. 258.

Another Massachusetts law provided that in all contracts for the sale and delivery of oats and meal "The same shall be bargained for and sold by the bushel;" and fixed the standard for each. It was held that a sale of oats by the bag without weighing was void and the

price could not be collected, although no actual deception was practiced.

Eaton vs. Kegan, 114 Mass. 43.

There was a prosecution for selling a boat load of coal without having the same gauged and inspected in accordance with the laws of Louisiana. The Louisiana statute required every boat load of coal to be gauged and inspected in a certain way, fixed standards of measurements, etc. The constitutionality of the law was attacked under both the state and federal constitutions but was sustained. Among other things the court said: "All that the statute under discussion purports to do or aims to accomplish is to protect buyers and consumers of coal sold in boats or barrels against fraud in weights and measurements." The court mentioned the fact that the coal was mined and sold in Pennsylvania under a different standard from that which prevailed in Louisiana so that the practical result was that what was sold for one hundred barrels in Louisiana represented but ninety-six barrels in Pennsylvania, and consequently that the law afforded a protection which the state owed to its citizens; and, the court refers to various federal decisions, amongst them *Gibbons vs. Ogden*, 9 Wheaton 203, in which it was said that the right of a state to pass proper inspection laws was beyond question, and "they form a portion of that immense mass of legislation which embraces everything within the territory of the state not surrendered to the general government, all of which can be most advantageously exercised by the states themselves."

State of Louisiana vs. The Pittsburgh & Southern Coal Co., 41 La. Ann. 465.

This case was affirmed by the United States Supreme Court in *The Pittsburgh & Southern Coal Co. vs. State of Louisiana*, 156, U. S. 590.

A statute prohibiting the selling of coal at retail in more than five hundred pound lots without having it officially inspected and weighed, was held constitutional.

Levy vs. Gowdy, 84 Mass. 320.

James vs. Joslin, 65 Me. 138.

A statute of Maine required that when lumber was sold by feet it must be surveyed and measured by an official surveyor. In a suit by a lumber dealer for price of lumber sold without being officially measured the court said: "When any lumber is sold, the price for which is to depend upon the number of thousands, which are to be ascertained by the survey or inspection of some person, the surveyor must be an official surveyor or the sale is void. On account of the opportunities for fraud possessed by the seller, the law refuses to trust any method but its own for the ascertainment of the quantity or quality of the lumber. Experts must be employed. Perhaps it would be expedient for the legislature to permit parties to a sale to waive any official survey. Such is not its present policy."

Richmond vs. Foss, 77 Me. 590.

On the like facts and construing a similar statute is *Williams vs. Tappen*, 23 N. H. 385.

An Arkansas statute prohibited contracts between mine operators and miners whereby the latter agreed to have their compensation for mining fixed and computed on screened coal. The act provided that unless paid by the day, week, month or hour, etc., the miners pay for coal mined must be determined by the amount of coal mined without screening it.

It was attacked as a "taking of property without due process;" as an unwarranted interference with "freedom of contract;" and as an improper deprivation of "equal protection of the laws—class legislation."

The state supreme court overruled the objections and sustained the law.

McLean vs. State, 81 Ark. 304.

The United State Supreme Court affirmed that decision and expressly overruled several state court decisions which had held such a law unconstitutional.

211 U. S. 539.

This case thoroughly discusses the right to pass police laws of this character and the manner of testing their reasonableness.

For a catalogue of the innumerable laws fixing the size, etc., of packages in which commodities shall be sold when not sold in bulk by actual weight or measurement, see the list appended to the opinion of the court in *Gibbons vs. Ogden*, 9 U. S. 1. This note appears beginning at page 119 of the official Edition and at bottom of page 51 of Book 6 Lawyers Ed., Note 6. This list is amplified and carried down to 1882 in a note appended to the de-

cision in *Turner vs. Maryland*, supra. (107 U. S. 43.)

A Massachusetts statute required bread made for sale to be sold in loaves of a given size. Defendant was convicted of violating the law.

Comm. vs. McArthur, 152 Mass. 522.

An ordinance of the City of Mobile required bread made for sale to be made into loaves of a given size and forbade the sale of other sizes. It was attacked as unreasonable, but sustained against that attack on the ground that it was a measure for the protection of the buyers from deceit and imposition, and hence was a proper police measure.

Mayor vs. Yuille, 3 Ala. 137.

The conviction was reversed, however, on the ground that the penalty was one not authorized by the law, because it was not certain and fixed in amount. This holding as to the penalty was afterwards overruled by the same court.

An ordinance of the City of Detroit required bakers to be licensed. It required all bread intended for sale, except certain fancy breads, to be made into loaves of certain weights, and forbade the sale of loaves of any other size.

It was attacked as unreasonable and violative of constitution rights. The law was sustained as a proper exercise of the police power; because it tended to prevent deception and imposition.

People vs. Wagner, 86 Mich. 594.

A Chicago ordinance required bread intended for sale to be made into loaves of certain weights and forbade sales of loaves which were not of the required size. It also required the loaves to be labelled showing the net weight and the maker's address.

This enactment was attacked, (1) as class legislation; (2) interfering with freedom of contract; (3) taking property without due process; (4) as unreasonable because it was impracticable to comply with it.

* City of Chicago vs. Schmidinger, 243 Ill. 167 and 245 Ill. 317.

Affirmed by this court in Schmidinger vs. Chicago, 226 U. S. 578.

A statute of Kansas provided that a loaf of bread for sale shall be two pounds in weight. And shall be sold only in whole, half and quarter loaves and not otherwise. Defendant was arrested for selling a loaf of bread containing but $13\frac{1}{2}$ ounces. He argued that this statute was arbitrary, unreasonable and meddlesome interference with the conduct of a legitimate private business in which the public was not involved, and, consequently, that it was unconstitutional and void. The court in sustaining the conviction says: "It is a matter of common knowledge that the bakery is an institution quite indispensable to every city and town. Practically every housewife is compelled to resort to it on frequent occasions, and many constantly depend upon it for that most necessary article of food, bread. Bread is sold by the loaf. The size of a loaf is fairly well established by

trade custom, and the price is generally a common price per loaf of the popularly understood size. There are among us today persons like those who in the time of Amos made the ephah small and the shekel great, and falsified the balances by deceit. Some of them make and deal in bread, and by shrinking the size of their loaves or by other devices they cheat the uncritical and unsuspecting public which relies upon the prevailing customs. The legislature found such practices to be sufficiently extensive in this state to need correcting. Therefore, every condition necessary to a valid exercise of the police power exists. * * * *

The regulations were designed to reach and do reach the very evil to be remedied. Price is unregulated. That will regulate itself. But, if a child be sent to the bakery for a loaf of bread it will return with a loaf of bread. If fraud were to be circumvented at all, it was necessary that the measures taken should be effective; but the regulations adopted are in no sense harsh or oppressive."

State vs. McCool, 83 Kans. 428.

The North Dakota act when properly construed is not discriminatory. It does not prohibit the packer, the wholesaler or any person from selling lard in any quantity desired by the seller or consumer when priced and delivered by actual weight. The statute only applies where it is put up in pails and sold by the pail.

In view of these examples and authorities it cannot be seriously doubted that for the purpose of preventing fraud and imposition upon consumers, made possible by

ignorance or thoughtlessness, it is within the police power to standardize the package in which a commodity is sold, when it is not sold in bulk and the price agreed upon according to actual weight or measure.

In addition to the authorities heretofore cited see the following well-considered cases, many of which are cited in the majority opinion (Tr. 205), in which legislation for the prevention of deception and fraud in trade and commerce is held to be a proper exercise of the police power and free of constitutional objections:

People vs. Girard, 145 N. Y. 105, 39 N. E. 823.

Squire & Co. vs. Tellier, 185 Mass. 18; 69 N. E. 312.

State vs. Campbell, 64 N. H. 402, 13 Atl. 585.

Neas vs. Borches, 100 Tenn. 308; 71 S. W. page 50.

People vs. Luhrs, 195 N. Y. 377; 89 N. E. 171 25

L. R. A. (N. S.) 473.

Lemieux vs. Young, 211 U. S. 489; 29 Supreme Court Rep. 174; 53 Law Ed. 295.

State vs. Fourcade, 45 La. Ann. 717; 13 S. 187.

Buttler vs. James, 36 Minn. 69; 30 N. W. 308.

Waterbury vs. Newton, 50 N. J. Law, 534, 14 Atl. 604.

Freund on Police Power, 275.

See also cases cited in the majority opinion, (Tr. pp. 197-8) and special concurring opinion (Tr. pp. 210-11).

Tiedman on Limitations of Police Power, Section 89, page 207, uses the following language: "A fraud is of course a trespass upon another's private rights, and

can always be punished when committed. It is therefore but rational to suppose that the state may institute every reasonable preventive remedy when the frequency of the frauds or the difficulty experienced in circumventing them is so great that no other means will prove efficacious. Where, therefore, police regulations are established which give to private parties increased facilities for detecting and preventing fraud, as a general proposition, these laws are free from all constitutional objection."

Freund in his work on police power. Section 272, in treating of this class of legislation says: "The private and the criminal law as well as the police power undertake to offer protection against fraud. They deal, however, with fraudulent practices only by remedial relief, treating a transaction as void or setting it aside, giving a claim for damages or inflicting a penalty after the fraud has been committed. In either case the element of fraudulent intent is essential. The police power undertakes to give an ampler protection both by adopting precautionary measures, and by forbidding certain practices irrespective of an actual intent to defraud. It does not in the first instance punish fraud, but prescribes regulations and punishes their violation. The intervention of the law proceeds upon the theory that every one who invites the confidence of the public may be compelled to submit to such regulations as will guard the public as far as possible against misapprehension."

ARGUMENT ON THE TRANSACTION IN QUESTION.

We will now consider the authorities and argument presented by the plaintiff in error in its attack upon this statute and the judgment of the Supreme Court of the State of North Dakota. Plaintiff in error contends for a narrow construction of Section 2 of the statute. (Page 20, 21, Brief.) This is not the rule for the construction of North Dakota penal statutes. The North Dakota Code, Section 11172, Compiled Laws of 1913, provides:

“The rule of common law that penal statutes are to be strictly construed has no application to this code. This code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to promote its objects and in furtherance of justice.”

Plaintiff in error argues: “THE PARTICULAR THING WHICH, IN PLAIN TERMS, IS REQUIRED BY SECTION 2 OF THIS ACT IS NOT THE SELLING OF LARD IN NET, EVEN POUND PAILS, BUT IS THAT LARD ‘SHALL BE PUT IN PAILS OR OTHER CONTAINERS HOLDING ONE, THREE OR FIVE POUNDS NET WEIGHT OR SOME WHOLE MULTIPLE OF THESE NUMBERS AND NOT ANY FRACTIONS THEREOF.’ IT IS THE PUTTING UP OF LARD IN PAILS OF OTHER SIZES THAN THOSE DESCRIBED WHICH IS FORBIDDEN. * * * THE LEGISLATURE DID NOT PENALIZE THE SELLING.” (Brief p. 20.)

This same question was raised by the demurer to the information and overruled by the trial court. It was

then argued, as it is now, that the only thing which is penalized in the statute is the putting up of lard contrary to the statute, and this having been done outside the state of North Dakota could not in any event be made a crime within that state. Such a construction would do violence to well settled rules for construing statutes. The title of the act indicates that it is: "An act to regulate the manner of sale of food products and beverages, and establishing the legal weight for lard or lard substitutes and for bread, and providing a penalty for the violation thereof."

Section 1, in part, is as follows:

"Every article of food or beverage as defined in the statutes of this state shall be sold by weight, measure or numerical count. * * *."

In Section 2, covering the subject of lard, it adds:

"Every lot of lard or of lard compound or of lard substitute, unless sold in bulk, shall be put up in pails or other containers holding one, three or five pounds net weight, or some whole multiple of these numbers, and not any fractions thereof. If the container be found deficient in weight additional lard, compound, or substitute, shall be furnished to the purchaser to make up the legal weight. The face label shall show the true name and grade of the product, the true net weight, together with the true name and address of the producer or jobber. * * * *"

The fact that the reference to the "putting up of lard, lard compound and lard substitutes" is found only in

Section 2 does not in any manner limit the language of Section 1 in its application to the entire act. The division of the statute into sections and paragraphs is purely an arbitrary matter, and in construing the law the court must give effect to all the language of the act. It can hardly be assumed that the legislature would attempt to prevent persons from putting up lard in any form which might please their taste or convenience, for certainly the general public could not be affected in any manner by such act. It is only when the lard is offered for sale that the public is interested. A fair and reasonable construction of the entire act makes it clear that the selling is the thing aimed at. The offense committed in this case was not the physical act of putting up the lard in South Omaha, but the act of selling it at Fargo, North Dakota.

Plaintiff in error is a corporation engaged in the packing business and its trade extends to all parts of the world. It has plants in a number of cities in the United States. In each of these plants lard is rendered and put up. It has no manufacturing plant within the state of North Dakota, but it has at least two branches or storehouses in that state from which it distributes lard and other products to the trade in the state of North Dakota. Goods are shipped in carload lots to these storehouses, unloaded and stored and distributed from them as required by the trade. After the goods reach the warehouses it clearly appears that they are no longer in transit. When placed in the warehouse they become part

of the goods within, and subject to the laws of the state of North Dakota. It appears that plaintiff in error has traveling salesmen soliciting sales from its North Dakota branches.

So far as the actual handling, sale and distribution of Armour & Company's goods, including lard in this state, is concerned it is the same as if the packing plant were located, and the products put up in North Dakota. As to the particular pail involved in this case, for the sale of which the plaintiff in error was convicted, the evidence is undisputed that it was found in its warehouse at Fargo in a crate, and that the crate was broken by the agent of plaintiff in error and the pail sold. Hence the plaintiff in error cannot successfully contend that it was convicted without due process of law and in the absence of a statute authorizing the conviction.

Austin vs. Tennessee, 179, U. S. 343;

Guckenheimer vs. Sellers, 81 Fed. Rep. 997;

In re Harmon, 43 Fed. Rep. 372;

Cook vs. Marshall, 196 U. S. 261.

PLAINTIFF IN ERROR ARGUES THAT SECTION 2 OF THE STATUTE, ARBITRARILY AND WITHOUT REASONABLE GROUND THEREFORE, SINGLES OUT LARD FROM ALL FOOD PRODUCTS AND IS THEREFORE VOID UNDER THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION. (Page 21, 26, Brief). It is urged that the act in question is special legislation. That it does not, by its terms, embrace and cover other products

commonly sold in packages. It is claimed that lard is singled out from all other products and that the statute places a burden upon the plaintiff in error in respect to the product mentioned in said act which is not placed upon all other persons. It is contended that the law is not general because it does not bear equally upon all persons and upon all other products which are put up and sold in packages or containers.

This position of plaintiff in error is not tenable in view of the well known fact that, so far as this country is concerned, from time immemorial lard has been the common pastry shortening; so much so that the word has become generic in its use and when employed in connection with the words "lard substitutes and lard compounds" refers to all those shortenings containing animal fat. Lard is in a class by itself. It would therefore appear that the classification is a natural one. Many kinds of goods are not of a character to be put up in even pounds, such as perfumes, drugs and medicines. Many articles of food are generally purchased in small quantities, and for such packages fractions of a pound are necessary and proper. In the case of lard, however, the pound has come to be the unit of measurement, at least so far as the actual consumer is concerned. The North Dakota statute operates equally upon all persons engaged in the lard industry. The position taken by the plaintiff in error is so extreme that if adopted any classification of products would be quite impossible. In all acts

standardizing weights and measures there must be a separation and classification of the products to be affected. Owing to the diversity in bulk, quality, ingredients and purposes for which they are to be used all products put up and sold in packages cannot reasonably be embraced in one class.

Plaintiff in error does not claim as we understand it, that a state cannot lawfully require all package goods to be put up in net weight containers with a face label showing the true name and grade of the product, or that it may not require the ingredients to be stated on the package, etc. We assume it would not argue that such an act would violate the Fourteenth Amendment of the Constitution of the United States when applied to package goods sold within the state of North Dakota and not subject to the protection of inter-state commerce. As we understand it the objection is that lard, lard compounds and lard substitutes alone are embraced in this statute, and not other food products in packages. This statute, as we have already attempted to show, was enacted to cure an evil which had grown up, peculiar to the lard trade. Surely the states, as well as the Federal government, are enacting measures for the protection of the public. Such laws come gradually, and are seldom, if ever, evolved in a complete code. North Dakota began requiring net weight whole pound packages with lard because it is an article of every-day use and sold in large quantities; and well adapted for packing in net containers of whole pounds.

Plaintiff in error cites the case of Connolly vs. Union Sewer Pipe Company, 184 U. S. 540, 558, 561, and quotes quite liberally from the opinion. That case is clearly distinguishable from the case at bar. The North Dakota statute does not deny the same protection of the laws to the plaintiff in error which is enjoyed by other persons, corporations and classes engaged in the same business and in like circumstances; the same burden is laid by this statute upon all persons engaged in the same character of business. Plaintiff in error and other packers are treated alike under like circumstances and considerations, and the law operates alike on them all and does not subject the plaintiff in error to an arbitrary and unreasonable exercise of the state police power. The facts in the Connolly case are entirely different from those in the case at bar. The statute there under consideration was an act in restraint of trade. The statute exempted producers of agricultural commodities and raisers of live stock who might combine their capital, skill or acts for any of the purposes named in the statute from punishment thereunder. This court considered this point and made the distinction clear in these words:

“We have seen that under the statute all except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live stock raisers in respect to their products or live stock in hand are exempted from the operation of the statute, and may combine or do that which, if

done by others, would be a crime against the state. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a state, and agriculturalists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right open to all, subject to such regulations, applicable alike to all in like conditions, as the state may legally prescribe."

In the Connolly case Mr. Justice McKenna dissented. After observing that the principle of classification is not different in tax laws than in other laws, and that that principle necessarily implies discrimination between the persons composing the class and other persons, and that the equality prescribed by the constitution is fulfilled if equality be observed between the members of the class, Mr. Justice McKenna stated what we believe to be sound law, as follows:

"The equality of operation which the constitution requires in state legislation cannot be construed, * * *, as demanding an absolute universality of operation, having no regard to the different capabilities, conditions, and relations of men. Classification, therefore, is necessary, but what are its limits? They are not easily defined, but the purview of the legislation should be regarded. A line must not be drawn which includes arbitrarily some persons who do and some persons who do not stand in the same relation to the purpose of the legislation. But a wide latitude of selection must be left to the legislature. It is only a palpable abuse of power of selection which can be judicially reviewed. And the right of review is so delicate that even in its best exercises it may lead to challenge. At times, indeed, it must be exercised, but should always be exercised in view of the function and necessarily large powers of a legislature."

In the same dissent Mr. Justice McKenna so well expressed the principle which ought to govern in weighing legislative reasons for an act, which might not be apparent on the face of it, that we will quote from his opinion as follows:

“What was the purpose of the Illinois statute, and what were the relations of its classes to that purpose? The statute was the expression of the purpose of the state to suppress combinations to control the prices of commodities, not, however, in the hands of the producers, but in the hands of traders, persons, or corporations. Shall we say that such suppression must be universal or not at all? How can we? What knowledge have we of the condition in Illinois which invoked the legislation, or in what form and extent the evil of combinations to control prices appeared in that state?”

May we not pertinently inquire what knowledge can this court have of the conditions in North Dakota with respect to the lard industry and the reasons which invoked the legislation in question, or what action on the part of the state was necessary to correct the evil? In the case of American Sugar Refining Company vs. the State of Louisiana, 179 U. S. 89, a case in which a constitutional provision which seems more discriminatory in its character than the North Dakota lard law, was under consideration, Mr. Justice Brown, in stating the opinion of this court, which sustained this provision of the Louisiana constitution, gave expression to what we believe is the law applicable to the case at bar, as follows:

“The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable dis-

inction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes."

Since plaintiff in error has seen fit to quote from the dissenting opinion (Page 25, 26, Brief) as authority in its favor, we will avail ourselves of the privilege of quoting from the majority opinion in support of our view, that the statute is reasonable, constitutional and valid, and is not discriminatory as against dealers in lard. The North Dakota supreme court said:

"The fourth claim of appellant is that the 1911 statute is void as class legislation; that lard is singled out from all the articles of food and subjected to restrictions while being prepared for market. To this it need only be said that the law of 1911, as well as many preceeding laws, regulated the manner of selling every article of food and beverage. Lard, lard compounds, and lard substitutes, being sold largely in pails, require a particular regulation not necessary for the regulation of such articles as butter, eggs, milk and cream. The regulation of the size of the pail is but an incident of the law. The fact that all foods are subject to regulation to prevent opportunity for deceit, is the main idea of the law. In appellant's brief the argument is made that the 1911 law is discriminatory in that it prescribes no regulations for such articles as Crisco, Cottolene, Vegetole, it being the contention of the defendant that those articles which contain no animal fat are not substitutes of lard. The witness Fox was placed upon the stand, evidently to testify as an expert to this effect, but upon cross examination he admitted that those vegetable compounds are intended

to and do take the place of lard and serve as a substitute for lard. The statute in express terms covers lard, lard compounds and lard substitutes, and in our opinion applies as well to Crisco and the other vegetable compounds as to lard itself, as those articles are used instead of and as a substitute for lard. There is therefore no discrimination against the lard industry. To the effect that those compounds are lard substitutes, see: *State vs. Hanson*, 84 Minn. 842; *State vs. Aslesen*, 50 Minn. 5; *State vs. Snow*, 81 Ia. 642." (Bottom of page 206 and top of page 207, Transcript).

The North Dakota supreme court cites with approval the case of *Powell vs. Pennsylvania*, 127 U. S. 678, and on this point quotes from the opinion as follows:

"The statute places under the same restrictions and subject to like penalties and burdens, all who manufacture, or sell, or offer to sell, or keep in possession to sell, the articles embraced by this prohibition; thus recognizing and preserving the principle of equality among those engaged in the same business."

It was argued in that case, as in this in behalf of the plaintiff in error, that if the Pennsylvania statute was sustained as a valid exercise of legislative power, then nothing could stand in the way of the destruction by the legislative department of the constitutional guaranties of liberty and property. This court, in answer to that contention, however, held that the possibility of the abuse of the legislative power does not disprove its existence, and held that although legislation of this character may be unwise or unnecessarily oppressive to those manufacturing a wholesome article of food, yet the courts cannot interfere without invading the province of

the legislative department of the government, and suggested that the appeal must be to the legislature or to the ballot, and not to the judiciary.

On the same question, Judge Bruce, in his specially concurring opinion, cites with approval the "Sinking Fund Cases," 99 U. S. 718, 9 Otto 700-727, and *C. B. & Q. Ry. Co. vs. McGuire*, 219 U. S. 563, and states the same proposition in this wise:

"The trend of authority in the United States, indeed, is undoubtedly in support of the proposition that the main question for the courts to determine is whether the subject matter is one over which the legislature can exercise a supervisory control, and that the questions of method and of exigency are questions which must generally be left for the legislative bodies to decide. If a regulation is within the scope of the legislative power and its purpose is not arbitrary supervision, but the protection of the public, the mere fact that it may be unwise in the opinion of the courts or involve an added expense upon the consuming public is no justification for judicial interference. The main arguments against the provisions of the statute which are now under consideration are that their enforcement might possibly prevent the sale of lard in packages in the state of North Dakota, or might so increase the cost of manufacture that an added price would have to be paid by the consumer. These matters, however, are for legislative and not judicial determination." (Bottom of page 211, top of page 212, Transcript.)

This court said in the *McGuire* case, which is cited by the plaintiff in error as an authority in its favor:

"Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve desired results, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular

manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

We contend that the legislature of the state of North Dakota, being familiar with the lard trade for many years, and acquainted with local conditions, was best able to judge of the necessity for the statute in question. The fact that the courts may not agree with the legislature in its views as to the necessity or propriety of this legislation constitutes no ground for judicial interference, unless the act is clearly in violation of constitutional guaranties of equal protection, and we respectfully contend that this statute is not so clearly and unmistakably in excess of the power of the legislature that it should be held for naught.

The supreme court of North Dakota has found facts which show that good reasons exist for the law, and its finding is entitled to stand unless clearly and palpably wrong. Our court said:

"With this conduct of the packers well known to the Food Commissioner and Legislature of this state it was only natural that an effort be made to secure better laws upon the subject. People had been educated to call those one, three, five and ten pound pails, as appears from the testimony of the defendant. Indeed, exhibit B in this case is a bill from Armour & Company to the Aneta Mercantile Company of Aneta, N. D., in which those pails were so designated by the defendant company itself. The purchaser was not able readily to extract the lard from the pail and weigh it. The lard was used from the pail itself in small portions and the fact that the pail was included in the gross weight might not

ordinarily occur to the housewife. The contention of the defendant that it had complied with the 1907 law, and that said law was sufficient to protect the consumers, is unsupported by the evidence." (Page 201, Transcript.)

PLAINTIFF IN ERROR CONTENDS THAT SECTION 2 OF CHAPTER 236 OF THE NORTH DAKOTA LAWS FOR 1911 IS ARBITRARY AND HAS NO REASONABLE RELATION TO THE PURPOSE WHICH IT IS COMPETENT FOR GOVERNMENT TO EFFECT. (Brief, p. 26.)

In other words, it is claimed that it is not the proper business of the state to regulate the size of containers of package goods. Plaintiff in error incidentally admits that the real profit to the packers, by using gross instead of net weight pails, has been the advertising which they have secured at the expense of the public. This is the real consideration back of the fight to annul this act. By reducing the quantity of lard in the containers the packers have been enabled to make and have succeeded in making the consumer pay vast sums for advertising various brands of lard, and their other products as well. They contend that the lard consumers have been benefited in that they have been enabled to obtain wholesome and sanitary lard in useful and durable pails. Of course the lard would have been as sanitary and the pails probably as useful and durable had they been made to contain the quantity of lard which the public supposed them to contain. Again we quote with approval

from the majority opinion of the supreme court of the state of North Dakota:

"An analysis of the evidence shows that the defendant company gets something besides the net cost of his pail. The plain pail costs little, but the defendant, seeing an opportunity of a lasting advertisement, has taken advantage of the consumer to advertise his goods at the housewife's expense. *

* * * The manager of the company testifies that the company gets the benefit of the lasting advertisement free. Analysis of the testimony therefore shows that Armour & Company is charging an expense of the advertising of their general business up to the lard industry. When a twenty pound pail of lard is sold it contains eighteen pounds of lard and two pounds of pail. If the consumer pays twenty-five cents a pound he has paid fifty cents for the pail and \$4.50 for the lard. This pail has cost the defendant around four cents for tin and a few cents for the making of the pail, which is done by machinery and very cheaply, and the rest of the charge must be for incidental expenses including the lithographing, and nobody knows the items thereof." (Transcript, page 203.)

It is true that the public demands the putting of lard in tin pails as a clean, sanitary and convenient method of handling the product, but there is no evidence of any demand on its part for gross instead of net weight pails. The statute in question aims, in part at least, to inform the public as to the actual cost of the containers. From the evidence in this case it would seem that the principal cost has been the lasting advertisement, so highly prized by the plaintiff in error and the other packers.

It is contended on the part of the plaintiff in error that the gross weight pails have never been used for the purpose of concealing or practicing fraud as to the quality

or contents of the lard contained therein, and it argues that the cost of the pails and their net contents have remained the same for more than twenty-five years and no deception has taken place. It may be true that there is no evidence in the record showing actual, wilfull, open and notorious fraud on the part of the packers. Had such been practiced the plaintiff in error could not have been able to dispose of these pails for more than twenty-five years.

The object of the statute is not alone to reach those guilty of flagrant deception but to remove the opportunity, and to take away the temptation to conceal the cost of advertising and other like expenses in the package. It is admitted in the argument that the packers did not disclose the net weight upon the pails until they were required to do so by law. There is not a scintilla of evidence in the record to show that the packers ever advertised that the pails sold by them were gross weight. They merely took advantage of the popular idea that the pails contained the quantity of lard which their designation as three, five or ten pound pails would imply. It is true that the intelligent and the wary at all times could have determined for themselves just exactly what they were getting in buying these containers. But laws like Chapter 236 of the Laws of 1911 are not necessary for the protection of the intelligent and the wary. The fact that purchasers of lard always had the opportunity of buying bulk lard instead of lard in pails does not alter

the case. Plaintiff in error virtually admits that it has been compelling the public to buy bulk lard or submit to an exaction for advertising in order to get its lard in the sanitary containers. It contends that the consumers "knew that they were buying gross weight pails, knew the weight of these pails and knew that the weight of the pail itself was included in the three, five or ten pounds gross weight." The record does not so show, and it is a pure assumption by the plaintiff in error. Against this contention we have the deliberate judgment of the legislature of North Dakota that an evil existed which should be corrected, in that the public supposed they were getting three, five or ten pounds of lard when in fact they were getting three, five or ten pounds of lard and metal, with expensive advertising thereon.

The plaintiff in error contends that the public was amply protected under the net weight labeling and sales laws of North Dakota for 1905 and 1907, which required all food sales in North Dakota to be by net weight; and the effect of its argument is that while either a label may be required or fixed sizes of container, yet both cannot be required because either one is sufficient. This argument is not sound because it is obvious that if either of the two requirements may be properly imposed surely both can be required if the legislature deems either one alone insufficient. We have heretofore cited a number of cases where both requirements were imposed and the law sustained, and we believe the plaintiff in error can-

not show a case where such requirements were held improper, except possibly the New York case of *State vs. Collins*, 53 N. Y. Supp. 968, a bread case which never reached the Court of Appeals of that state.

Plaintiff in error claimed in the supreme court of the state of North Dakota that the statute is not an inspection law and claims in this court that it cannot be sustained as a police measure for the protection of the public welfare. The inference is that if the legislature of North Dakota had imposed, as an additional safeguard, that all lard be inspected by an official so as to make sure that the requirements as to quality, quantity and size of package had been complied with, then the law would be good, because it would be an inspection law such as was upheld in *Turner vs. Maryland*, 107 U. S. 38. Such argument is not sound, we think, for this reason: It would not change the character of the law and the principles by which it should be tested, that inspection is provided for. It would still be a police measure for the protection of the public welfare, and the provision for inspection would be merely an added safeguard.

Under the authorities heretofore cited we submit that it is a proper question for the legislature to determine whether the public were amply protected in the sales of lard by the labeling law, or whether further legislation is necessary, such as that furnished by Chapter 236 of the Laws of 1911. There is nothing in the constitution of the state of North Dakota or in the federal constitu-

tion which forbids the state to make additional or new requirements as to weight, measure and labeling laws. Experience showed the legislature that the laws of 1905 and 1907 were not adequate to protect the public welfare, and the 1911 law was enacted, not to take the place of these laws but as an additional requirement.

Plaintiff in error contends that the act is arbitrary because, without reason, it compels it, and other packers relatively, to incur an initial expense of over \$11,000 in changing their machinery so as to make containers for the North Dakota trade of even net weight as required by Section 2 of the statute. The testimony, which was introduced over the objection of the state and which we contend was improperly received, shows, as we construe it, that this sum would purchase machinery, dies, etc., sufficient to turn out as many of the even pound net weight pails as are now turned out of the present gross weight pails. The point which this argument brings out is that the packers want to continue the present fractional pound pails wherever they may do so without coming in conflict with the law. As we have attempted to show, the sale of merchandise, and especially food products such as lard, in gross packages is wrong in principle, and we do not think the plaintiff in error can successfully contend that it has a property right to sell in gross weight containers, which is protected by the federal constitution. It would be more in accord with natural justice, as well as the correct principle which should govern

the sale of package goods, for the plaintiff in error to make all pails in accordance with the requirements of the North Dakota statute for its trade here and elsewhere. It is probably only a question of a short time when it will be the universal requirement that food products shall be sold in net, instead of gross weight packages.

The character of lard being such that it readily lends itself to packing in even, net weight containers it cannot be said that the requirement to be so put up is arbitrary and unreasonable. It may be inconvenient for a time to make the change, but if that were a test of arbitrary, confiscatory and discriminatory legislation no reforms could ever be effected. It was probably inconvenient for the railroads to change from the old and dangerous method of coupling railway cars to the automatic couplers, but that constituted no reason why they should not be compelled to obey the law. Plaintiff in error has failed to point out wherein the law will injure the business of lard producers. It affects all producers alike.

It is claimed that the law is arbitrary in preventing lard consumers from buying the product in pails and in a quantity with which they are, from long use, familiar. In answer it may be said that the public were long accustomed to buy goods which were not labeled at all and were even adulterated and misbranded. No objection came from the public when manufacturers and merchants were required to state the net weight on their

packages and the ingredients of which the contents were composed. A fair construction of the evidence, if it is to be considered at all in this case, does not show that the price of lard should be increased by requiring the packers to use the North Dakota pails. Counsel for the plaintiff in error pleads for the retention of the custom of marketing lard in the fractional pound containers because it has been long in vogue. As was said by the North Dakota supreme court, the fact that a wrong practice has continued for many years is no reason that it should be allowed to go on forever. The analogy attempted to be drawn by counsel, on page 30 of their brief, that this statute is as arbitrary as one would be which required all shoes and hats to be sold in even sizes, and prohibited the sale of half, quarter or eighth or other fractional sizes, is so absurd that it hardly merits notice. Yet it is seriously contended that the principle is the same as applied to lard.

The trouble with the old method of putting up and selling lard in fractional sized pails is that in the general run of sales there was no actual agreement between the purchaser and the dealer as to the quantity. The law does not aim to restrict or interfere with contracts where the facts are known to both sides, and there is a meeting of the mind on what is contracted for and sold. This is not the case with the fractional or short weight lard pails. These were put out as three, five and ten pound pails, etc. The packers are in position to arbitrarily fix,

and have arbitrarily fixed the quantity in the pails upon no natural classification. What is the reason or principle that underlies the packing of lard in containers of fractional pounds? The only answer that can be made is that it has been customary to do it, that the custom has continued a long time; but it was hit upon by the packers and continued for the purpose of indirectly making the public pay for their advertising. If there was any natural reason why this commodity should be packed in this manner there would be some force to the argument that the law is unreasonable.

We have been repeatedly challenged to state a definite purpose of the North Dakota law. We think we have shown that its purpose is to prevent deception, imposition and fraud upon the consumer. That it is a police regulation in the interest of the public welfare. That it is intended to protect those who are in need of protection from deception skillfully concealed. The court will take cognizance of the situation not only in this state but in the Union with respect to the lard industry. The business of the packers has grown to such proportions that, as in the case of railroads, the public must, in a large measure, accept their services and products or go without, and they should equally be required to obey the regulations and laws applicable to them, which have for their object the protection of the consumer and the public welfare.

We take issue with the statement of counsel, found on page 31 of the brief, that the North Dakota court en-

tertain the view that the purpose of the law was, or might be, to compel lard producers to sell lard in pails at the same price they get for tierce lard, and to furnish the pails free to those who wish to buy lard in containers. That was not the holding, or even the suggestion, of the court on this point. What the court said was that the consumer is entitled to know something about the cost of the container, including the advertising, and that when he buys lard he should not be compelled to pay for metal and advertising in order to get pails of convenient size.

Plaintiff in error says, (Page 32, Brief):

“But further and more important still, if we assume that fraud and deception are being practiced, or that it was possible or probable, in selling lard in packages, the section in question has no relation whatever to the prevention of the same.”

The North Dakota law does not go beyond the correction of the evil sought to be cured. The evil has been short weight packages of lard, and former laws have failed to afford an adequate remedy. The objection that the law may impose an additional burden upon the packers by way of increased expense and inconvenience is not tenable; such objections can be urged against all pure food, net weight and measure, and inspection laws. Shall it be held by the court that because North Dakota has set out to protect its citizens against fraud the trade shall not be put to the inconvenience of obeying the law? Is it any argument against the law that other states have not similar acts? And that is one of the reasons claim-

ed by plaintiff in error why the North Dakota law is so burdensome and unreasonable, that it amounts to the taking of property without due process of law. It might as consistently argue that because other states had failed to enact pure food legislation this state could not lawfully enact such laws. There was a time when a few states, like North Dakota and Kentucky, required sausage and other meat products to be packed free from coloring matters and preservatives, and it was necessary for the packers to maintain a separate department in which the sausages for these states were mixed, free from preservatives, yet, was this inconvenience any reason why these states should not protect themselves from the danger to health, and from fraud, which came from the use of antiseptics and coloring matters? Before the enactment of the national pure food laws the prevention of all adulteration and misbranding was entirely in the hands of the states, and it was necessary for the manufacturers and wholesalers of the country to prepare separate formulas and labels for the eight or ten states in which the pure food laws were enforced, but was this any legitimate reason against the validity and enforcement of such laws? It is possibly true that if this law is enforced it would require a slightly different trade practice with respect to lard in North Dakota than in any other state, and require special machinery if lard producers expect to continue to use the fractional pails wherever they are not prohibited from so doing. If this

is a good argument then North Dakota nor any other state can ever pass any such police regulations unless a substantial number of other states simultaneously adopt the same laws and regulations.

In one part of its argument the plaintiff in error emphasizes the fact that their product is sold in gross weight containers and then again they state that it will be necessary to print and distribute special prices lists and circulars for North Dakota, in order to inform the trade and public as to the true net weight; that this, together with all other expenses referred to and complained of, must be ultimately borne by the consumers of North Dakota without any real benefit to themselves. They claim that to increase the size of the pails to make them contain even pounds will increase the cost of packing. This certainly is not ordinarily true. It has always been believed that the more the package contains the less the package should cost the consumer in proportion.

The act will prevent the packers from going to any arbitrary cost in advertising, fancy labels, lithographing, etc., and then tucking all of these costs into, and displacing the full weight of lard in the pail without the consumers' knowledge. It is, of course, the packers' wish that such costs should be tucked in by decreasing the net weight of the product in the package, and the record shows that such has been the practice ever since the beginning of the packing of lard in gross weight containers. If this practice is permitted to outweigh the

validity of an inspection law, and the packer permitted to thus add such costs, without the knowledge of the consumer, then what control is there ever to be had from their arbitrary, ad libitum adding of such costs?

It is of course self evident that the consumer pays the cost of the pail or other package, but the people of North Dakota have enacted this statute to the end that the expense of the package and its filling and handling shall be paid for at the true value, shall be added to the full pound of lard, rather than to be deducted according to the arbitrary estimate of the packer from the net weight of the product supposed to be contained in the package.

All over the United States the people are seeking relief from short weights and measures, especially in package goods. The North Dakota act presents one of the first effective measures affording such relief, and a decision in this case will have a far reaching effect in promoting or discouraging legislation to prevent fraud in the weight and measure of package goods.

PLAINTIFF IN ERROR (Page 37 of its Brief) ASSERTS THAT SECTION 2 OF THE NORTH DAKOTA ACT, AS APPLIED TO THE SALE OF THE LARD IN QUESTION TO LADD, CONFLICTS WITH THE LABELING PROVISION OF THE FEDERAL FOOD AND DRUG ACT AND THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION. In support of this contention counsel cites and quotes from two cases decided by this court, namely: *Savage vs. Jones*, 225 U. S. 501, and *McDermott vs.*

State of Wisconsin, 228 U. S. 115. We believe the dissenting opinion of Judge Bruce on this point (Page 213, 214, Transcript) refutes this contention of the plaintiff in error. He said:

“Nor too is there any force in the contention that the statute in question is in derogation of the interstate powers of the Federal Congress. The most recent cases upon the subject, and upon which counsel for the defendants principally rely (*Savage vs. Jones*, 225 U. S. 501 and *McDermott vs. Wisconsin*, 228 U. S. 115.) make it clearly appear that the mere fact that Congress may have passed a so-called Food and Drugs Act, has not tied the hands of the state in the case in question. State statutes in such cases are only invalidated where they interfere with or frustrate the operation of the acts of Congress. It cannot be said that the act in question does this. It is merely supplementary thereto. All that the act of Congress says is that if the weight of the package is given upon the label it shall be the correct weight. The cases of *Savage vs. Jones* and *McDermott vs. Wisconsin*, in fact, are authority for and not against the state in this case. It is true that in the latter case the statute of Wisconsin was held invalid; but the statute of Wisconsin forbade the use of the federal label altogether. Federal regulations of interstate commerce have perhaps been widely extended, but we do not believe that the courts have yet construed the power so as to take from the states the inherent right of self-protection; nor can we believe that it was ever intended by the framers of our government that the protection of the people of a state from fraud and adulteration should be dependent upon the whim of a federal congress located thousands of miles away, with no knowledge of local conditions, and located in what the late Justice David J. Brewer has termed the ‘lobby camp of the world.’ It also appears to me that in the case at bar the question of interstate commerce is not really involved, as the original package seems to have been broken.”

The North Dakota statute under consideration does not conflict with the federal food and drugs act in any manner whatever. It does not forbid or in any manner interfere with the labeling of the package demanded by the federal statute. In the case at bar the pail of lard reached the consumer after it had reached its destination in the branch establishment of the plaintiff in error at Fargo. It had already been located, and had become a part of the goods, within the state of North Dakota, and was subject to the state law. The sale so far as the federal act is concerned may have been a lawful sale, but that does not excuse the failure to comply with the state act, which is a provision in addition to and not in conflict with the federal act. Had the pail sold to Ladd fully complied with the state law it would, nevertheless, while in interstate commerce, have been also subject to the federal law requiring it to be labeled with its correct net weight. It is contended that in order to lawfully sell the lard in these pails under the state act plaintiff in error would have to change the labels which comply with the requirements of the federal law. There is nothing contained in the state law which can be construed to require any such thing.

That the single pail of lard sold to Professor Ladd was not an interstate shipment, and as such coming under the protection of the federal pure food law of 1906, is completely refuted by the facts and made clear in the majority opinion of the North Dakota supreme court (on pages 207 and 208 of the Transcript). And the

cases there cited, from this and other federal courts, bear out the state's contention that the pail was no longer in the domain of interstate commerce.

PLAINTIFF IN ERROR ATTEMPTS TO DISTINGUISH THE BREAD CASES AND THE TENNESSEE CASE OF STATE VS. CO-OPERATIVE STORE COMPANY, 123 TENN. 399, FROM THE CASE AT BAR, AND ASSERTS THAT NO OTHER STATE OR COUNTRY HAS ADOPTED A STATUTE CONTAINING SUCH ARBITRARY PROVISIONS AS ARE CONTAINED IN SECTION 2 OF THE ACT (Brief 45-51).

Plaintiff in error urges that invidious discrimination is shown because the regulations contained in Chapter 236 of the Session Laws of North Dakota for 1911, as to bread, are not so stringent as they are with respect to lard. It is obvious that the same regulations could not be made to fit bread as would apply to lard; and the legislature could have properly left out any regulations as to bread without affecting the validity of the lard regulation. The difficulty of making bread come out in even weights is far greater than with respect to lard. There is no difficulty in that respect in connection with lard; while there is as to bread, as shown in the Michigan, Illinois and other bread cases. This difference is a very proper one for the North Dakota legislature to take notice of and apply. We have already, in another part of this brief, referred to the bread cases from a

number of states. Bread and lard are both commodities of every-day use, sold and handled in quantities with which the public is familiar, and there is no difference in principle between an act requiring a standard loaf of bread to weigh one pound and a standard package of lard to contain one pound. The fact that one commodity is encased in a metal container while the other is not does not alter the case. What the law aims at is the content and not the package or the absence of a package.

Plaintiff in error attempts to distinguish this case from the Tennessee case. Counsel say (page 47, Brief): "In that case the supreme court of Tennessee was dealing with a state statute providing for the sale of corn meal in bags containing two bushels, one bushel, one-half bushel, one-fourth bushel and one-eighth bushel. Corn meal was a common article of food in Tennessee. By common usage it was generally sold by the bushel or fraction of the bushel," and refer to an alleged fraudulent practice which had arisen in that state of putting into these bags a different quantity of meal, so that many of them did not contain what they purported to contain; and it is further claimed by plaintiff in error that there is a substantial difference between the statute of the State of Tennessee and that of North Dakota. The defendant in error maintains, however, that both statutes are substantially the same. To clearly show this we set them out in parallel columns, as follows:

NORTH DAKOTA.

"AN ACT to Regulate the Manner of Sale of Food Products and Beverages, and Establishing the Legal Weight for Lard or Lard Substitutes and for Bread, and Providing a Penalty for the Violation Thereof.

1. FOODS SOLD BY WEIGHT, MEASURE OR COUNT.) Every article of food or beverage as defined in the statutes of this state shall be sold by weight, measure or numerical count and as now generally recognized by trade custom, and shall be labeled in accordance with the provisions of the food and beverage laws of this state. Only those products shall be sold by numerical count which cannot well be sold by weight or measure. All weights shall be net, excluding the wrapper or container, and shall be stated in terms of pounds, ounces, and grains avoirdupois weight, and all measure shall be in terms of gallons of two hundred and thirty-one (231) cubic inches or fractions thereof, as quarts, pints, and ounces. Reasonable variations shall be permitted and tolerations therefor shall be established and promulgated by the food commissioner.

TENNESSEE.

"AN ACT to Fix the Weight and Regulate the Trade in Corn Meal; that Whereas the Practice in this State of Putting Up and Selling Meal in Short-weight packages is against the Public Welfare and the Interest of Legitimate Trade.

Section 1. Be it enacted by the general assembly of the State of Tennessee, that the standard weight of a bushel of corn meal, whether bolted or unbolted, shall be forty-eight (48) pounds.

Section 2. Be it further enacted, that it shall be unlawful for any person or persons to pack for sale, sell, or offer for sale in

2. WEIGHT OF LARD.) Every lot of lard or of lard compound or of lard substitute, unless sold in bulk, shall be put up in pails or other containers holding one (1), three (3), or five (5) pounds net weight, or some whole multiple of these numbers, and not any fractions thereof. If the container be found deficient in weight additional lard, compound, or substitute, shall be furnished to the purchaser to make up the legal weight. The face label shall show the true name and grade of the product, the true net weight, together with the true name and address of the producer or jobber. If other than leaf lard is used then the label shall show the kind, as "Back Lard," or "Intestinal Lard." Every lard substitute or lard compound shall also show in a manner to be prescribed by the food commissioner, the ingredients of which it is composed, and each and every article shall be in conformity with, and further labeled in accordance with the requirements under the food laws of this state. * * * * *

4. PENALTY FOR SO DOING.) Any person

this State any corn meal except in bags or packages containing by standard weight two bushels or one bushel or one-half bushel or one-fourth bushel or one-eighth bushel respectively. Each bag or package of corn meal shall have plainly printed or marked thereon, whether the meal is 'bolted' or 'unbolted,' the amount it contains in bushels or fraction of a bushel, and the weight in pounds: Provided, the provisions of this section shall not apply to the retailing of meal direct to customers from bulk stock when priced and delivered by actual weight or measure.

Section 3. Be it further enacted, that any person

violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and for the first offense shall be punished by a fine of not less than five dollars (\$5.00) nor more than one hundred dollars (\$100.00) and the necessary costs, and for the second and each subsequent offense he shall be fined not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100.00), or ninety days in jail, or both, at the discretion of the court."

or persons guilty of violating either of the foregoing sections of this act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine of not exceeding one hundred dollars (\$100) or by imprisonment in the discretion of the court."

The defendant in error contends that the facts of the Tennessee case are in effect identical with the case at bar, and the principle which underlies the Tennessee statute is equally applicable to the North Dakota act. The Tennessee law fixed the standard weight of a bushel of cornmeal, whether bolted or unbolted, at 48 pounds, and required the meal to be put up in two, one, one-half, one-fourth and one-eighth bushel bags by standard weight; that is, by net weight. It did not require the bags to come up to the full gross weight.

Much emphasis is placed upon the introductory statement in the Tennessee statute, assigning the reasons for its passage. Plaintiff in error claims that such statement shows that a fraudulent practice had arisen and that dealers were selling packages which were below the weight represented. It will be noticed in the statement

of the court that there is nothing which shows that the bags may not have been full gross weight. Later in Section 2 it clearly appears that what is intended is that the amount of meal in the bag, when sold in a bag of one bushel, for instance, shall be 48 pounds, and not that the meal and the bag together shall weight 48 pounds.

The Tennessee statute was held valid, not because it contained an introductory statement to the effect that the practice in that state of putting up and selling meal in short-weight packages is against the public welfare and the interests of legitimate trade, but because it was a valid police regulation, so, the absence of any such recital in our statute does not militate against its validity as a police regulation. The North Dakota statutes does not establish a new standard or unit of measurement. The pound is, and has been from time immemorial, the unit of measurement in the lard industry. The act merely recognizes the unit and insists upon its use when lard is sold in packages which purport to contain lard by the pound, as in the Tennessee case, the statute only applies where the product is put in packages for sale and sold or offered for sale without being weighed or measured. What the Tennessee court said:

“We see nothing in this statute which deprives a citizen of the liberty to contract, or of his property.

“It simply provides that when a certain staple article of food, of universal consumption in this country, is sold in packages, the packages shall contain certain quantities of the article, and that the quality and quantity—that is, whether bolted or un-

bolted, and how many bushels, fractions of bushels, and pounds—shall be printed and marked thereon.

“It is well known that cornmeal is generally sold by the bushel, or the fraction of a bushel, and is put in packages purporting to contain such quantities, and the object of the statute is to prevent the giving of short weights in these packages, and the consumers from thus being deceived and defrauded, it is true, of small sums, but which, on account of the numerous sales, in the opinion of the legislative department, is a public evil which should be suppressed. It in no sense deprives the owner of his property, or the power to sell and dispose of it in a fair and honest manner.

“Nor is the act, when properly construed, discriminatory. It does not prohibit the manufacturer, the wholesaler, or any person from selling meal in any bag, or other receptacle, or quantity, desired by the seller or consumer, when priced and delivered by actual weight or measure. All persons, whether retailers or not, may sell it in that way.

“The statute only applies where it is put in bags or packages for sale, and sold or offered for sale without being weighed or measured”—,

is clearly applicable to our statute. There is nothing in the North Dakota law which would prohibit any person from buying, nor the packer from selling, lard in any pail or other receptacle or quantity agreed upon between the seller and consumer when priced and delivered by actual weight or measure.

The Tennessee statute did not prohibit the retailing of meal direct to customers from bulk stock when priced and delivered by actual weight, as the North Dakota statute does not forbid the sale of any quantity of lard to consumers from bulk stock when priced and delivered by actual weight or measure. Neither statute prohibits the manufacturer or wholesaler or any person from selling

the product in the package or receptacle or quantity desired by the seller or consumer when priced, contracted for and delivered by actual weight or measure. Both laws are intended to govern sales of the product by package without being actually weighed and sold by weight. For instance, the selling or buying of 2 1-2 pounds of lard and having it put up for the customer by agreement in a pail containing exactly that amount would be a sale in bulk by the pound, and not by the pail, within the meaning of the North Dakota statute, just as the selling under the Tennessee statute of meal in any bag or other receptacle or quantity desired by the seller or consumer when priced and delivered by actual weight or measure would not be a violation of the Tennessee law. In both such situations there would be a meeting of the minds of the seller and the buyer. There would be no holding out, by designation of the package, as to the amount sold, but it would be understood and agreed upon.

So, in *Eldridge vs. McDermott*, 178 Mass. 256, a statute was construed which required oats to be sold only by the pound or bushel. The court found that the transaction in question was not a sale by the bag because the evidence showed that the agreement between the parties contemplated that the seller should deliver oats in bags but should weigh into each bag two bushels of oats. Hence the court held that it was in effect a sale by the bushel of oats, put up in bags.

The evidence is clear that the sale to the complaining witness in this case was by the pail and charged by the

pail, and not by weight. Under the statute of Massachusetts providing that, in all contracts for the sale and delivery of oats and meal, "the same shall be bargained for and sold by the bushel," the seller was not allowed to recover for oats sold by the bag.

Eaton vs. Kegan, 114 Mass. 433.

Plaintiff in error claims that the pails which it has heretofore manufactured and furnished are of a standard size, well known to the public, and universally accepted as three, five, ten, etc., pounds pails, and no claim is or can be made that they were delivered by actual weight or measure within the meaning of the statute. They were sold without being weighed or measured, and, therefore, under the principle which underlies the Tennessee, Massachusetts and North Dakota statutes, they are unlawful. This idea is shown in Section 2 of the North Dakota act, where it provides that:

"If the container be found deficient in weight additional lard, compound, or substitute, shall be furnished to the purchaser to make up the legal weight."

Of course, if the lard and pail are contracted for and paid for separately there could be no violation of the statute; it would be a sale in bulk within the purview of the statute.

The indictments were sustained in the Tennessee case not because the seller cheated in the quantity of meal which he sold but because he sold meal in the open market in a bag which did not contain, by standard weight,

the quantity prescribed by the statute. This is shown by the indictments, which read as follows:

"That the Co-operative Store Company, a corporation, on the 31st day of May, 1909, in the State and county aforesaid, unlawfully sold corn meal in bags containing only 21 pounds, standard weight, the said sales not having been direct to customers from bulk stock, and not having been priced and delivered by actual weight, contrary to the statute, and against the peace and dignity of the State."

"That the W. M. Ausmus Company on the 10th day of June, 1909, in the state and county aforesaid, unlawfully put up at its place of business, being engaged in the milling business, for sale, and did unlawfully sell, cornmeal in bags containing only 21 pounds, said sales not having been made by retail to customers from bulk stock, but having been put up in 21 pound packages to supply the wholesale trade, and having been sold in the wholesale trade, contrary to the statute, and against the peace and dignity of the State."

Plaintiff in error contends that the North Dakota statute, unlike the Tennessee act, established a new and arbitrary standard of quantity for sales, which is entirely different from that which for a quarter of a century has been known to the consumers of lard. It says that it does not, like the Tennessee statute, merely affirm an existing standard of quantity.

The North Dakota act does not establish a new and arbitrary standard of quantity. On the contrary, the lard packers have attempted to establish an arbitrary standard of quantity by the use of fractional pound pails. The standard of quantity is the pound, as the standard of quantity is the bushel of 48 pounds in Tennessee.

The defendant in error respectfully contends that the judgment of the Supreme Court of the State of North Dakota should be affirmed.

Respectfully submitted,

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ARMOUR & COMPANY *v.* STATE OF NORTH
DAKOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH
DAKOTA.

No. 258. Argued March 3, 6, 1916.—Decided April 3, 1916.

The statute of North Dakota requiring lard when not sold in bulk to be put up in pails or other containers holding a specified number of pounds net weight or even multiples thereof and labeled as specified is not unconstitutional as denying equal protection of the law or as depriving the sellers of their property without due process of law; nor is it, as to packages sent into the State from other States and afterwards sold to consumers by retail, unconstitutional as an interference with, or burden on, interstate commerce.

The net weight lard statute of North Dakota is directed to the manner of selling lard at retail and is not repugnant to the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768, which is directed against adulteration and misbranding of articles of food transported in interstate commerce.

27 N. Dak. 177, affirmed.

THE facts, which involve the constitutionality under the commerce, due process and equal protection provisions of the Federal Constitution and the Fourteenth Amendment thereto of the full weight provisions of the statute of North Dakota, relative to the sale of lard in containers and their validity under the Food and Drugs Act, are stated in the opinion.

Mr. N. C. Young, with whom *Mr. Alfred R. Urion*, *Mr. Abram S. Stratton* and *Mr. J. S. Watson* were on the brief, for plaintiff in error.

Mr. Andrew Miller, with whom *Mr. Henry J. Linde*, Attorney General of the State of North Dakota, *Mr. Francis J. Murphy*, *Mr. H. R. Bitzing*, *Mr. Alfred Zuger* and *Mr. B. F. Tillotson* were on the brief, for defendant in error.

240 U. S.

Opinion of the Court.

MR. JUSTICE MCKENNA delivered the opinion of the court.

A statute of the State requires (§ 1) that "every article of food or beverage as defined in the statutes of this State shall be sold by weight, measure or numerical count and as now generally recognized by trade custom, and shall be labeled in accordance with the provisions of the food and beverage laws of this State. . . .

"Section 2 (Weight of Lard). Every lot of lard compound or of lard substitute, unless sold in bulk, shall be put up in pails or other containers holding one (1), three (3), or five (5), pounds net weight, or some whole multiple of these numbers, and not any fractions thereof. If the container be found deficient in weight additional lard, compound, or substitute, shall be furnished to the purchaser to make up the legal weight. The face label shall show the true name and grade of the product, the true net weight together with the true name and address of the producer or jobber. If other than leaf lard is used then the label shall show the kind, as 'Back Lard,' or 'Intestinal Lard.' Every lard substitute or lard compound shall also show, in a manner to be prescribed by the food commissioner, the ingredients of which it is composed, and each and every article shall be in conformity with, and further labeled in accordance with the requirements under the food laws of this State."

Violations of the act are made misdemeanors with a minimum and a maximum fine increased for subsequent offenses.

In pursuance of the statute the state's attorney for the County of Cass filed an information against plaintiff in error for unlawfully offering for sale and selling to one E. F. Ladd a quantity of lard not in bulk which was put up by the company and sold and delivered to Ladd in a pail which held more than two pounds and less than three

pounds net weight of lard, to-wit, two pounds and six ounces, which pail or container did not have or display on the face label thereof the true net weight of the lard in even pounds or whole multiples thereof but expressed the weight of the lard in pounds and ounces.

A demurrer to the information was overruled and the Armour Company pleaded not guilty. A stipulation was entered into waiving a jury trial and that the issues be tried by the court.

The company was found guilty and adjudged to pay a fine of \$100. The judgment was affirmed by the Supreme Court of the State and this writ of error was then allowed by its Chief Justice.

The assignments of error attack the validity of the statute, specifying as grounds of the attack that the statute offends the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and also the commerce clause of the Constitution.

Armour & Company is a New Jersey corporation. It is a packer of certain pork products and has packing plants where it produces lard as an incident to its business in Illinois, Missouri, Iowa and Nebraska. It has no plant in North Dakota but has a branch office establishment in the City of Fargo in that State, to which its goods are shipped in car load lots to be distributed therefrom. The branch at Fargo is under the charge of a local manager.

In October, 1911, the State Food Commissioner went to the company's establishment at Fargo and asked to purchase three pounds of lard. He was sold a pail containing two pounds and six ounces. It was upon this sale as a violation of the statute that the information was filed and for which the Armour Company was convicted and sentenced.

The Supreme Court considered the statute as but a development of other laws passed in the exercise of the

240 U. S.

Opinion of the Court.

police power of the State to secure to its inhabitants pure food and honest weights, questions which the court thought were "inseparably allied and any argument advanced upon one applies equally to the other." And the court said as the law was drafted by the Pure Food Commission, it might be reasonably assumed, "after twelve years of observation and study" and, further, that "the expert who drafted the law, the legislature who passed it and the Governor who approved it, all thought necessity existed for the measure. If we did not agree with all those, we might well hesitate to say that there was absolutely no doubt upon the question, but in fact a majority of this court believes the law not only reasonable, but necessary, and this belief is founded on the evidence in this case and upon facts of which this court can take judicial cognizance."

The court, by these remarks, expressed the test of a judicial review of legislation enacted in the exercise of the police power, and in view of very recent decisions it is hardly necessary to enlarge upon it. We said but a few days ago that if a belief of evils is not arbitrary we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation or certainly know them or be convinced of the wisdom or adequacy of the laws. *Rast v. Van Deman & Lewis*, ante, p. 342; *Tanner v. Little*, ante, p. 369. It only remains to apply to the present case the principles so announced.

Lard is a very useful product and its many purposes are set forth in the testimony. It was originally sold in the State only in tierces and tubs, that is, in bulk. A demand arose for smaller and more convenient packages and the

Armour Company and other packers responded to that demand and put their lard in three, five and ten pound pails, gross weight, the net weight of lard at first having no indication but subsequently, in obedience to the state laws, being indicated by labels, and in the present case by a small label at two pounds and six ounces. The practice of selling by gross weight is a continuation of the practice of selling by bulk.

The Armour Company asserts an inviolable right in the practice as convenient and useful and free from deception. But experience does not justify such unqualified praise. The practice has its advantages, no doubt, but it is the observation of the officers of the State that it conceals from buyers their exact purchases—there is confusion as to what the price paid compensates, whether lard or tin container.

The Armour Company contests this conclusion and contends that the label upon the package, put on in observance of a law of the State passed in 1907,¹ shows the net weight of the lard, and protects the consumer from imposition while it preserves to the company a useful method of packing and a necessary freedom of business with the public. To this we reply the law of 1907 was deemed necessary to protect the purchaser against the concealment in the method of the packers, the amount of lard not being indicated. Supposedly the requirement was not adequate, and the law of 1911 was passed. However, with a comparison of the laws we have nothing to

¹ The law of 1907, reproducing the provision of a law passed in 1905, provided as follows:

"Ninth. If every package, bottle or container does not bear the true net weight, the name of the real manufacturer or jobbers, and the true grade or class of the product, the same to be expressed on the face of the principal label in clear and distinct English words in black type on a white background, said type to be in size uniform with that used to name the brand or producer. . . ."

240 U. S.

Opinion of the Court.

do, nor need we even consider, as the Supreme Court considered, with some reluctance, that the label used by the company was a scant compliance with the law of 1907 if not an evasion of it. We need only deal with the law under review and the justification for its adoption. Evils attended the method of the company which the Food Commission of the State thought should be redressed and which the legislature reasonably believed were definite and not fanciful and in this belief passed the law. And the belief being of that character removes the law, as we have already said, from judicial condemnation; and besides there is nothing in the testimony inconsistent with it.

The testimony of the company was directed at great length to show the advantages of selling in containers over selling in bulk, and the expense to the company of the former and the additional expense which the law would require. And meeting the objection that the company fixed the price of the lard by the gross weight of the package, in other words, as though there were three pounds instead of two pounds six ounces, it was replied that by so doing there was no profit to the company and only a reimbursement of the cost of the tin container and extra cost of putting up the lard in that style of package.

But this does not justify the practice of the company nor establish the invalidity of the law of the State. The advantages are in a sense made a snare and the testimony means no more than that the packer has built up a trade on a system of gross weight which enables it to practice a kind of deception on the purchaser that he is getting three pounds of lard when he is only getting two pounds six ounces, and enables the packer to pay for the container. The evil of the transaction is not in the latter but in the former, that is, in the deception. The correction of the statute is that the lard and the container shall be unequivocally distinguished and the purchaser have the

direct assurance of the quantity of lard he is receiving, knowledge of its price and the cost of the container to him, a means of estimating his purchase free from disguises or the necessity of an arithmetical estimate of what he is getting or paying for upon the market fluctuations of lard and tin. This may involve a change of packing by the company and the cost of that change, but this is a sacrifice the law can require to protect from the deception of the old method. The law is allied in principle, as the Supreme Court of the State observed, to regulations in the interest of honest weights and measures. It involves no giving up of what the company has a right to retain and the cost of the container as well after change as now can be cast upon the purchaser, he, however, being able to determine if it is worth the price he has to pay for it.

There are advantages undoubtedly in packing lard in pails, advantages to the packer and the consumer, but the advantages are not on account of selling by gross instead of by net weight. In other words, all of the advantages will be retained by a compliance with the provisions of the law, that is, by putting up the lard in one, three or five pound packages, net weight, or some multiple of those numbers. It is in the testimony that the packing company furnishes lard in net-weight pails to Park & Tilford, of New York City, that is, in weights of three, five and ten pounds, and has been doing so for a few years.

The equal protection clause of the Fourteenth Amendment is invoked by the Armour Company and the specification is that the law under review "arbitrarily and without reasonable ground therefor singles out lard from all food products" which are sold in packages, such as "prints of butter, packages of coffee, boxes of crackers, and the endless number of other products sold in package form are not included, and no natural and reasonable

240 U. S.

Opinion of the Court.

ground for excluding them and in singling out lard has been suggested."

The range of discretion that a State possesses in classifying objects of legislation we may be excused from expressing, in view of very recent decisions. The power may be determined by degrees of evil or exercised in cases where detriment is specially experienced. *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 411; *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 161. The law of North Dakota does not exceed this power.

It is objected that the law violates the commerce clause of the Constitution. This is certainly not true of the sale to Ladd. It was distinctly by retail and in the package of retail, not in the package of importation. And it is to such retail sales the statute is directed. It does not attempt to regulate the transportation to the State.

Nor do we think that the law is repugnant to the Pure Food and Drugs Act of June 30, 1906 (c. 3915, 34 Stat. 768, 780). That act is directed against the adulteration and misbranding of articles of food transported in interstate commerce. The state statute has no such purpose; it is directed to the manner of selling at retail, which is in no way repugnant to the Federal law (*Rast v. Van Deman & Lewis, ante*, p. 342), and the operation of that law is in no way displaced or interfered with.

Judgment affirmed.